89-864 (1)

No. _____

In The

Supreme Court of the United States

October Term, 1989

IN RE: HOLYWELL CORPORATION, et al.,

Debtors

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, HOLYWELL CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

v.

FRED STANTON SMITH, individually and as Trustee of the MIAMI CENTER LIQUIDATING TRUST; THE BANK OF NEW YORK; THE CITY NATIONAL BANK OF MIAMI, as Trustee under Land Trust #5008793, M. C. HOLDING PARTNERS, a New York General Partnership, and its General Partners, namely, ROBANK CORPORATION, H. D. LIQUIDATION, INC., ZENTAC INVESTMENTS, INC., BOTT FLORIDA HOLDING CORPORATION, AMERICAN SECURITY LTD., and M. CENTER CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a traditional common law action for breach of fiduciary duty, negligence, breach of contract, and conversion related only peripherally to a bankruptcy proceeding can be heard without consent by a bankruptcy court, or must it be heard by an Article III court.

2. Whether a bankruptcy court has authority to construe a plan of reorganization as an agreement, binding upon all parties and relieving an agent of such a court, from the common law duty to exercise due care, diligence, and skill in the custody of a fiduciary estate and the obligation of discharging duties required by applicable laws.

3. Whether a litigant can be deprived of his right to a trial by jury, guaranteed under the provisions of the Seventh Amendment to the Constitution, in a lawsuit involving the acts and transactions of a fiduciary appointed by a court of the United States, concerning property vested in the fiduciary in accordance with the provisions of a plan of reorganization. See 28 U.S.C. Section 959(a).

PARTIES TO THE PROCEEDINGS

Petitioners Miami Center Limited Partnership, Miami Center Corporation, Theodore B. Gould, Chopin Associates, and Holywell Corporation were Appellants before the United States Court of Appeals for the Eleventh Circuit.

Petitioner Miami Center Limited Partnership (hereinafter referred to as "MCLP") is a limited partnership formed in accordance with the laws of the State of Florida in 1979, consisting of forty (40) units of limited partnership interests, owned by twenty-five (25) separate persons, for the business purpose of engaging in the development of a mixed-use commercial real estate project in Miami, Florida, referred to as the "Miami Center."

Petitioner Holywell Corporation (hereinafter referred to as "Holywell"), incorporated in the State of Delaware in 1976, owns ten (10) units of MCLP's limited partnership interests and is the stockholder parent of Miami Center Corporation.

Petitioner Miami Center Corporation (hereinafter referred to as "MCC"), incorporated in the State of Florida in 1979, is MCLP's corporate general partner.

Petitioner Theodore B. Gould is a resident of Albemarle County in the Commonwealth of Virginia, Holywell's sole stockholder, and MCLP's individual general partner.

Petitioner Chopin Associates (hereinafter referred to as "Chopin"), a general partnership of MCC and Theodore B. Gould, formed in accordance with the laws of the State of

PARTIES TO THE PROCEEDING – cont.

Florida in 1979, leased certain land located in Miami, Florida, to MCLP for the development of the Miami Center in accordance with a Ground Lease Agreement, entered into in 1980.

Respondent Fred Stanton Smith, individually and as Trustee of the Miami Center Liquidating Trust (hereinafter referred to as "Trustee"), was an Appellee below, having been appointed by the United States Bankruptcy Court for the Southern District of Florida, and having been assigned title and vested with possession of substantially all of the property of the estates of the Miami Center Limited Partnership, Miami Center Corporation, Theodore B. Gould, Chopin Associates, and Holywell Corporation.[1]

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[1] Respondent Fred Stanton Smith was appointed Trustee of the Miami Center Liquidating Trust on August 12, 1985, App. 45, *after* confirmation of the amended consolidated plan of reorganization filed by The Bank of New York on behalf of the debtors Miami Center Limited Partnership, Miami Center Corporation, Theodore B. Gould, Chopin Associates, and Holywell Corporation.

Article V, *Creation of Trust*, of the amended consolidated plan of reorganization, App. 54, provided the foundation for the bankruptcy court's appointment of the individual designated as Trustee of the Miami Center Liquidating Trust. The Trustee was assigned title and vested with:

> ". . . all property of the estates of the debtors within the meaning of Section 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds [*$30,045,532*], and all claims and causes of action, if any, of the Debtors. . . ."

The Trustee's powers and authority were specifically defined, in relevant part, as follows:

> "(a) *Enter* into the Contract of Sale and to perform all duties

(Continued on following page)

PARTIES TO THE PROCEEDING – cont.

Respondent The Bank of New York, an Appellee below, is the indemnitor of Fred Stanton Smith, in accordance with a certain Letter Of Indemnity entered into on October 10, 1985, with respect to any of his acts in the implementation of the amended consolidated plan of reorganization and the execution of a certain Amended Contract of Sale, entered into on October 10, 1985, pursuant to which the Trustee sold certain land, leasehold improvements, and certain chattels of the estates of Chopin and MCLP for an appraised fair market value of $255,600,000 to the City National Bank of Miami, as Trustee of a certain land trust.

Respondent City National Bank of Miami, Purchaser, an Appellee below, is the Trustee under a certain Land Trust No. 5008793, of which the sole beneficiary is M. C. Holdings Partners.

Respondent M. C. Holdings Partners, an Appellee below, is a general partnership formed in accordance with the laws of the State of New York, consisting of Respondents Robank

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that are necessary or appropriate to effect the sale of the Miami Center . . . ; (b) perfect and secure his right, title and interest to the Trust Property; (c) Reduce all the Trust Property to his possession and hold the same . . . ; (e) *Manage, operate*, improve and protect the Trust Property as specified herein . . . ; (j) Release, convey or assign any right, title or interest in or about the Trust Property . . . ; (n) Deposit Trust funds and . . . make disbursements thereof . . . ; (q) Sue and be sued . . . ; (s) *Invest* funds of the Trust . . . ; (t) Prosecute and defend all actions affecting the Trust Property; [and] (u) *Settle, compromise*, release, *discontinue* . . . any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them. . . ." App. 54.

PARTIES TO THE PROCEEDING – cont.

Corporation (a subsidiary of the Bank of New York), H. D. Liquidation, Inc. (a subsidiary of Irving Trust Company), Zentac Investments, Inc. (a subsidiary of Security Pacific Bank), BOTT Florida Holding Corp. (a subsidiary of the Bank of Tokyo), American Security Ltd. (a subsidiary of American Security Bank), and M Center Corporation (a subsidiary of the International Brotherhood of Electrical Workers).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Miami Center Limited Partnership, Miami Center Corporation, Theodore B. Gould, Chopin Associates, and Holywell Corporation respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit denying a Petition for Rehearing and Suggestion of Rehearing In Banc entered on August 29, 1989, with respect to its original order entered on July 7, 1989.

OPINIONS BELOW

The Judgment of the United States Court of Appeals, entered on September 28, 1989, is printed in the Appendix attached hereto ("App.") at App. 1. The order of the Eleventh Circuit Court of Appeals, entered on August 29, 1989, denying a Petition for Rehearing and Suggestion of Rehearing In Banc, is printed at App. 3. The court of appeals' original order, entered on July 7, 1989, is printed at App. 5.

The opinion of the district court, entered on October 31, 1988, affirming the bankruptcy court's dismissal of the complaint, removed from state court, alleging breach of fiduciary duty, negligence, breach of contract, and conversion, is printed at App. 7. The district court's order adopting the bankruptcy court's report and recommendation that causes of action alleging breach of fiduciary duty, negligence, breach of contract, and conversion were "core" matters under 28 U.S.C. Section 157, is printed at App. 22.

Other opinions of the lower courts, which were the subject of appeal below or are relevant to the Court's consideration of this Petition, are printed in the Appendix and, where such opinions have been reported, the citation is indicated in the Table of Contents to the Appendix.

STATEMENT OF JURISDICTION

Petitioners had filed an appeal to the Eleventh Circuit Court of Appeals from orders entered by the United States District Court for the Southern District of Florida, affirming the authority of a bankruptcy court to exercise subject matter jurisdiction concerning controversies related to the Respondent Trustee's acts and transactions with respect to property of their estates and his conduct of their business.

The district court had entered an order on March 2, 1988, affirming and adopting a report of the United States Bankruptcy Court for the Southern District of Florida on a petition for removal of a complaint, which had requested a jury trial, from the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. The grounds for requesting a jury trial were that the causes of action alleged, namely, breach of fiduciary duty and negligence on the part of the Trustee and breach of contract and conversion on the part of The Bank of New York, City National Bank, and M. C. Holdings Partners were "core" matters under 28 U.S.C. Section 157.

The district court also entered an opinion on October 31, 1988, concluding that a confirmed plan of reorganization's provisions are binding upon a party in interest and are therefore the "law of the case." Thus, the district court concluded that the plan's provisions represent an agreement *relieving* a trustee, appointed as an agent of a bankruptcy court, of (a) his common law duty to exercise due care, diligence, and skill of a prudent person, and (b) the obligation to discharge duties required by statute. The district court also concluded that, since the causes of action alleged in the removed complaint were "core" matters in the court's opinion under 28 U.S.C. Section 157, the bankruptcy court had the authority to deprive the plaintiffs of a trial by jury, with respect to the defendant's acts concerning the property vested in his possession and his conduct of the business of their estates.

The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. Section 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The applicable provisions of the United States Constitution and the United States Code are set forth in the Appendix hereto at page 107. In particular, this case involves the application of 28 U.S.C. Section 959(a) and 28 U.S.C. Section 1334(c)(2).

28 U.S.C. Section 959(a) provides as follows:

> "Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury."

28 U.S.C. Section 1334(c)(2) provides as follows:

> "Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy."

STATEMENT OF THE CASE

On *October 15, 1987*, Petitioners filed a "Complaint And Request For Jury Trial" in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, App. 27. The

Complaint alleged breach of fiduciary duty and negligence against Fred Stanton Smith, individually and as Trustee of the Miami Center Liquidating Trust. The requested relief was money damages and dismissal of the defendant as Trustee of the Miami Center Liquidating Trust. The facts alleged, *inter alia*, as a means of establishing the causes of action for breach of fiduciary duty and negligence were as follows:

1. Having been vested with possession of substantially all of the property of Holywell Corporation and Theodore B. Gould's bankruptcy estate, including exclusive authority over *$30,045,532* in cash and securities, the Trustee did *not* determine the amount or establish any reserve for unpaid income taxes incurred during the administration of the estate[1] and arising from the Miami Center's sale[2] in implementing the plan of reorganization filed by The Bank of New York on behalf of the debtors.[3]

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[1] The corporate income taxes of Holywell Corporation, consolidated with nondebtor subsidiaries, and the personal income taxes of debtor Theodore B. Gould's bankruptcy estate arise from taxable income in the amount of *$38,566,768* related to a cash distribution in the amount of *$32,971,830* received from their financial interests as partners in the sale of the property, referred to as the "Washington Properties," during the administration of the estate.

[2] The sale of the Miami Center Limited Partnership's assets represented a net taxable capital gain of *$58,696,802* and an ordinary loss of *$19,861,810* to Holywell Corporation, consolidated with Miami Center Corporation. Theodore B. Gould's bankruptcy estate had a net taxable capital gain of *$18,976,083* and an ordinary loss of *$6,421,123* from the taxable events arising from the Trustee's sale of MCLP's assets in accordance with the Plan's provisions.

[3] On *April 28, 1988*, notwithstanding the provisions of *28 U.S.C. Section 2201*, the bankruptcy court entered a Final Judgment granting the Trustee declaratory relief from the statutory obligation of making the income tax returns and payment of taxes incurred during administration of the estate and arising from the sale of the estate's property. App. 106. Affirmed S.D. Fla., *United States of America v. Fred Stanton Smith*, July 31, 1989. App. 119.

(Continued on following page)

2. At the closing of the Miami Center's sale on October 10, 1985, the Trustee allowed the Defendant City National Bank of Miami, as purchaser, to take a credit of *$27,050,115* of postpetition interest on The Bank of New York's "undersecured" claim, App. 48, after having sought and obtained an indemnity from The Bank of New York holding him personally harmless for his conduct in execution of the Contract of Sale and implementation of the Plan's provisions.[4]

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But compare Bkrtcy. S.D. Fla., "Cash Collateral" Order, December 31, 1984, requiring the determination and payment of federal income taxes incurred on income earned during administration of the estate. See 28 U.S.C. Section 960; 26 U.S.C. Sections 6012(b)(3), 6151(a), and 7701(a)(6); *In the Matter of I. J. Knight Realty Co.*, 501 F.2d 62 (1974); *Louisville Property Co. v. Commissioner of Internal Revenue*, 140 F.2d 547 (6th Cir. 1944). An appeal of this order is presently pending in the Eleventh Circuit, and a stay precluding the disbursement of the Trust's funds was granted by that court on September 8, 1989.

[4] On December 18, 1987, notwithstanding the debtors' objection that the doctrine of *res judicata* precluded the bankruptcy court from revising the Confirmation Order's findings of fact in *Fred Stanton Smith v. The Bank of New York, Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership, Chopin Corporation* [sic], *and Theodore B. Gould*, "Complaint For Breach Of Contract And Declaratory Relief," filed October 28, 1987, a different bankruptcy judge allowed the Purchaser to take a credit for post-petition interest on The Bank of New York's undersecured claim. App. 131. On appeal, the district court vacated the bankruptcy court's revised judgment and stated as follows:

> "Trustee Smith initiated this adversary action in the bankruptcy court due to his concern over a statement in the bankruptcy court's original confirmation order dated August 8, 1985: 'The Bank of New York, the major creditor, whose claim is undersecured . . . ' Smith's concern is understandable, as he does not dispute Holywell's contention that under Section 506(b) of the Code, a post-petition interest credit is *only* appropriate for an oversecured creditor. *See United Stav.* [sic] *Ass'n. v. Timbers of Inwood Forest*, 108 S.Ct. 626, 631

(Continued on following page)

3. The Trustee failed to repay from the assets of the Miami Center Limited Partnership the "Super-Priority" loans, authorized by the bankruptcy court, in the principal amount of *$4,717,404.96* plus accrued interest. [The bankruptcy court had directed the Trustee to repay the "Super-Priority" loans and concluded that "The Plan, which must be strictly construed against its proponent, the Bank, makes no explicit provision for . . . " substantive consolidation of the debtors' estates extinguishing these loans. App. 101. In denying The Bank of New York's motion for rehearing, the bankruptcy court also stated "I would not have confirmed a plan nullifying the 1985 orders that are at issue here." App. 105]

4. The Trustee failed to pay the claim of the Miami Center Joint Venture in the amount of *$14,417,679* from the sale proceeds of *$255,600,000* on October 10, 1985, notwithstanding that the priority of MCJV's claim was superior to the Bank of New York's liens and the claims of unsecured creditors, and also that, in accordance with the Plan's provisions, the Trustee was directed to purchase MCJV's property leased to MCLP at fair market value.[5] App. 60.

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(1988). This indicates that *the trustee sought to protect his position* due to concern over the credit for post-petition interest provided for in the Plan of reorganization." (Emphasis added) App. 136.

Nevertheless, the district court concluded that the Eleventh Circuit's "mootness" ruling, 838 F.2d 1547 (1988), *cert. denied*, 109 S.Ct. 69 (1988), denying the debtors' request to place a higher sale value on the Miami Center, precluded determining whether The Bank of New York was "entitled" to the payment of post-petition interest on its "undersecured" claim, since the credit was "an integral component of the confirmed Plan." An appeal is pending in the Eleventh Circuit.

[5] See 11 U.S.C. Section 361(3) and its legislative history. Adequate protection must be provided "as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." Payment for the fair market value of *$4,986,900* would normally be a first claim on the sale proceeds. As of October 31, 1989,

(Continued on following page)

5. The Trustee acquiesced in the defendant Bank's action requiring the escrow of *$7,006,115* of the sale proceeds payable to MCLP's account for disputed prepetition *ad valorem* real estate taxes and granted the Purchaser a credit for *$4,291,625* for the Seller's pro rata share of disputed post-petition *ad valorem* real estate taxes, a'though Dade County, the local governmental taxing authority, did *not* file *any* proof of claim or any application for administrative expenses as to real estate taxes in the bankruptcy proceedings.

On *December 22, 1987*, the bankruptcy court submitted a "Report On Petition For Removal And Motion For Remand" to the district court, concluding as follows:

> "The matters in the state court action sought to be removed are 'core' matters under 28 U.S.C. Section 157 over which this court has jurisdiction." App. 25.
>
> "The matters in that state court action are matters relating to the implementation and administration of the plan of reorganization confirmed by this court. . . ." App. 25.

On *March 2, 1988*, the district court affirmed and adopted the bankruptcy court's "Report and Recommendation On Petition For Removal and Motion For Remand," concluding:

> "It is clear that this court has jurisdiction over the CAUSE pursuant to 28 U.S.C. Section 1334 and as such removal from the state court was proper under 28 U.S.C. Section 1452. Further, because *this court is satisfied that the claims set forth in Plaintiff's complaint are core matters* under 28 U.S.C. Section 157 the bankruptcy court properly has subject matter jurisdiction and authority to hear and determine the claims presented." App. 23.

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MCJV's allowed Claim No. 502 is still unpaid and the fiduciary estate has been burdened with carrying costs as interest of *$7,191,297* for such nonpayment.

On *May 12, 1988*, the bankruptcy court entered an order dismissing the adversary complaint, having concluded as follows:

> "The complaint contains no sufficient allegations that Fred Stanton Smith was guilty of *gross negligence, willful default* or *misconduct*, as provided [in] Article 5, paragraphs 7 and 8 of Confirmed Amended Consolidated Plan of Reorganization. *Such allegations are required to establish individual liability under the terms of the Plan.*" (Emphasis added)
>
> " . . . all matters contained in the adversary complaint have either been resolved by this court in other pending adversary complaints or motions which were heard before the court (and which rulings are presently on appeal) or are the subject of pending adversary proceedings or motions and which will be resolved in ordinary course." App. 20.

On *October 31, 1988*, the district court entered a Memorandum Opinion, which is the principal subject of this Petition for Writ of Certiorari, affirming the bankruptcy court's dismissal of the removed complaint, in which the district court construed the opinion of Justice Brandeis, rendered on behalf of this Court in *United States Ex Rel. Willoughby*, as follows:

> "The Appellants argue that although the Plan sets forth a standard of gross negligence, willful default or misconduct for breach of fiduciary duty, the correct standard in a common law action is due care, diligence and skill. The Appellants argue that the Bankruptcy Court can not limit this common law duty even where a trust expressly limits liability. *U.S. ex rel Willoughby v. Howard*, 445 U.S. 442 (1937). The Court . . . [said] that the fact that a fiduciary's freedom of choice was limited by statute did not relieve that fiduciary from the common law duty of 'exercising care and prudence within the field left to his discretion.' *Id.* at 452.
>
> In the case *sub judice*, the allegations of misconduct refer not to 'the field left to [the trustee's]

discretion' but rather to duties that were required by the Confirmed Plan of Reorganization. The Appellants assert that the Plan established a minimum standard of care, and that the Trustee was still liable *under a common law duty* to a higher standard.

This argument overlooks the fact that the Appellants are not claiming that the Trustee breached his common law duty while acting within the provisions of the Plan, but rather that his actions under the Plan *themselves* breached his common law duty. Thus *the two standards here are in direct conflict.* [footnote omitted] *The question is therefore not whether the Plan relieved the Trustee of his common law duty, but whether the duties required by the Plan were controlling.*

As stated above, *Willoughby* held that a trustee has the common law duty of exercising reasonable care 'unless relieved of such duty by agreement, statute, or order of court.' *Willoughby* at 450. *Here, such agreement did exist.* The provisions of a confirmed plan bind all parties whose rights are affected by the plan, regardless of whether they voted to accept it. *In re Sanders*, 81 B.R. 496, 499 (Bankr. W.D. Ark. 1987). 'Once the confirmed plan has become consummated, it becomes the law of the case.' *In re Jartran, Inc.*, 76 B.R. 123, 125 (Bankr. N.D. Ill. 1987). Further, 'a party in interest . . . is bound by the terms of the plan when confirmed, even if the plan ultimately provides it with less than that to which it is otherwise entitled.' *In re St. Louis Freight Lines, Inc.*, 45 B.R. 546, 552 (Bankr. E.D. Mich. N.D. 1984). Thus, *were the allegations contained in the Complaint involve duties required under the Plan, those duties control and the Trustee is relieved of personal liability for any conflicting duties under the common law." (Emphasis added)* App. 12.

REASONS FOR GRANTING THE WRIT

I. A Traditional State Common Law Action Related Only Peripherally As A Collateral Controversy To A Bankruptcy Proceeding Can Only Be Heard By An Article III Court. Breach Of Fiduciary Duty, Negligence, Breach Of Contract, And Conversion Are Not "Core" Matters Subject To The Jurisdiction Of A Bankruptcy Court.

(a) The threshold issue is whether a bankruptcy court has subject matter jurisdiction *after confirmation* to hear a complaint alleging breach of fiduciary duty, negligence, breach of contract, and conversion as "core" matters, based upon the court's construing 28 U.S.C. Section 1334(a) as granting a district court *original* and *exclusive* jurisdiction of all cases under title 11. App. 23.

It is a fundamental principle of the constitutional arrangement of political institutions in the United States that a court which was *not* established pursuant to Article III, Sec. 2, App. 141, only has the authority to exercise subject matter jurisdiction over controversies and causes of action specifically enumerated in the statute. Breach of fiduciary duty, negligence, breach of contract, and conversion are not *specifically enumerated* as "core" proceedings[6] in 28 U.S.C. Section 157(b)(2), App. 145.

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[6] See *In re Castlerock Properties, Inc.*, 781 F.2d 159 (9th Cir. 1986) " . . . we are persuaded that a court should avoid characterizing a proceeding as 'core' if to do so would raise constitutional problems (citation omitted). The apparent broad reading that can be given to Section 157(b)(2) should be tempered by the *Marathon* decision."

> "This circuit has interpreted Marathon as depriving the bankruptcy court of jurisdiction to make final determinations in matters that could have been brought in a district court or a state court."
>
> " . . . we hold that state law claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. 157(b)(2)(B)-(N) are related proceedings under Section 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, Sections 157(b)(2)(A) and (O). . . ."

Diversity jurisdiction does not exist unless each defendant is a citizen of a different state from each plaintiff. There is no pendent federal jurisdiction[7] providing the basis for the exercise of subject matter jurisdiction in a bankruptcy court to hear causes of action cognizable *only* at state common law, especially when only peripherally related to an adjudication of bankruptcy under federal law, merely because the Petitioners, as debtors, had previously filed a petition in reorganization. Hence, the "Abstention Doctrine," defined in 28 U.S.C. Section 1334(c)(2), is applicable and either the district court should have remanded the case to the state court or the case should have been adjudicated in an Article III court with a jury deciding the facts. In accordance with the standard of *Williams v. Austrian*, 331 U.S. 642 (1947), the instant case may be adjudicated in an Article III federal court on the basis of its relationship to the petition of reorganization. But this relationship does *not* transform the state-created "non-federal" causes of action into "public" rights.

The constitutional rule of law upon which the plurality opinion in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) was based is the historical precedent set forth in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272 (1855):

> "[W]e do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law,. . . ." 18 How. at 284.

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[7] See *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1977). Justice Stewart, rendering the Court's opinion, concluded that statutory law, as well as the Constitution, limits a federal court's jurisdiction over "non-federal" claims, meaning claims as to which there is no independent basis for federal jurisdiction and that despite the fact that federal and "non-federal" claims arose from the same core of operative facts conferring jurisdiction over federal claims did not allow the exercise of jurisdiction over "non-federal" claims.

Justice Rehnquist's concurring opinion in *Northern Pipeline* is pertinent in considering a bankruptcy court's exercise of subject matter jurisdiction for the purpose of dismissing a removed complaint for breach of fiduciary duty and negligence as common law actions for money damages:

> "From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit. *No method of adjudication is hinted, other than the traditional common law mode of judge and jury. The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that Court.*"[8] [Emphasis added] 458 U.S. 50, 102 S.Ct. at 2881.

It is the general duty of a trustee in the State of Florida to administer a fiduciary estate diligently for the benefit of its beneficiaries. *Fla. Stat. Section 737.301.* A trustee may *not* enter into any transaction that is inconsistent with the interest of the trust estate or its beneficiaries. *First National Bank v. Massey,* 132 Fla. 113, 182 So. 187 (1937). A trustee has a strict duty to render a full and accurate accounting of his trusteeship to the vested beneficiaries at prescribed times. *Fla. Stat. Section 737.303(4).* Issues of a trustee's liability for management of the trust estate may be determined in a proceeding for an accounting, surcharge, or indemnification, or in any other appropriate proceeding. *Fla. Stat. Section 737.306(4).*

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[8] See also *Thomas v. Union Carbide Agricultural Products Co., supra* at 588-589, and *Commodities Futures Trading Commission v. Schor,* 106 S.Ct. 3245, 3251, 3252 (1986) reaffirming *Northern Pipeline* with respect to (a) the "adjunct" and "public rights" doctrines and (b) the holding that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional state common law action, *without* the consent of the litigants, and subject only to appellate review.

As the plurality opinion stated in *Northern Pipeline*, citing *Crowell v. Benson*, 285 U.S. 51 (1931), the " 'liability of one individual to another under the law as defined' is a matter of private rights. . . .Only controversies in the . . . category [of public rights] may be removed from Article III courts. . . ." 102 S.Ct. at 2870. Thus, "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from adjudication of state-created private rights. . . ." *Id.* at 2871.

(b) *Commodities Futures Trading Commission*, 106 S.Ct. 3245 (1986), has restated the inviolable fundamental principle that subject matter jurisdiction cannot be conferred by consent of the parties. The bases for this principle is the separation of powers:

> "Article III Section 1 safeguards the role of the Judicial Branch in our tri-partite system by barring congressional attempts to transfer jurisdiction [to non-Article III tribunals] . . . [citations omitted] To the extent that this structural principle is implicated in a given case, the parties cannot by consent confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, Section 2. [Citations omitted] When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve constitutional interests that the parties cannot be expected to protect." 106 S.Ct. at 3257.

A bankruptcy court has "exclusive and undelegable control over the administration of an estate in its possession."[9] but "Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate."[10] "[E]ven when the controversy involve[s]

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[9] *Callaway v. Benton*, 336 U.S. 132, 142 (1949), citing *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940); *Isaacs v. Hobbs Tie & T. Co.*, 282 U.S. 734 (1931).

[10] *Id., supra* at 142, citing *Arkansas Corporation Commission v. Thompson*, 313 U.S. 132 (1940) and *Gardner, Trustee v. New Jersey*, 329 U.S. 565 (1946).

property within the exclusive jurisdiction of the bankruptcy court, that court may postpone action pending adjudication of the question in another court." *Id.* n. 11.

The various courts of appeal have adopted the general rule that the predicate of a bankruptcy court's jurisdiction is the possession of property; upon "substantial consummation" in accordance with 11 U.S.C. Section 1101(2), transferring the estate's property to the entity formed for the purpose of carrying out the plan,

> "the jurisdiction of the bankruptcy court over the property is generally said to terminate and does not follow it. . . .Similarly, the bankruptcy court may not, as a general rule, adjudicate disputes between third parties not involving the bankrupt or his property, *Evarts v. Elroy Gin Corp.*, 204 F.2d 712, 717 (9th Cir. 1953),. . . ." *In re Samoset Associates*, 654 F.2d 247, 253 (1st Cir. 1981).

Bankruptcy courts lack jurisdiction over controversies *not* involving claims against the debtor or its property and over controversies in which the bankruptcy and its unsecured creditors have no interest. *Matter of Paso Del Norte Oil Co.*, 755 F.2d 421, 425 (5th Cir. 1985), citing *Nixon v. Michaels*, 38 F.2d 420, 424 (8th Cir. 1930).

The Bankruptcy Amendments and Federal Judgeship Act of 1984, amending the Bankruptcy Reform Act of 1978, based upon the jurisdictional provisions distinguishing between "core" bankruptcy proceedings and matters that are only "related" to title 11 cases, precluded bankruptcy courts, as non-Article III judges, from exercising jurisdiction in matters " 'concerned only with State law issues that did not arise in the core bankruptcy function of adjusting debtor-creditor rights." *In re Arnold Print Works, Inc.*, 815 F.2d 165, 166-167 (1st Cir. 1987). In "non-core" or "related" proceedings, unless the parties consent to the bankruptcy court's jurisdiction, a bankruptcy judge's authority is limited to submitting "proposed findings of fact and conclusions of law to the district court," and the parties are entitled to *de novo* review of any matters to which they "timely and specifically" object. *Id.* at 167. The Eleventh Circuit's affirmance of the district court's

order, is in direct conflict with the First Circuit Court of Appeals, which noted that 28 U.S.C. Section 1334(c)(2) *requires* a court in a bankruptcy case to abstain from hearing a "State law cause of action" upon timely motion of remand, leaving the parties to sue in state court. *Id.*

(c) "A cause of action does not consist of facts but of the unlawful violation of a right which the facts show. The facts are merely the means and not the end. They do not constitute the cause of action, but show its existence by making the wrong appear." *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1926).

In *Mine Workers v. Gibbs*, 383 U.S. 715, 722 (1966), citing *Hurn v. Oursler*, 289 U.S. 238 (1932), this Court's opinion concerning the exercise of the jurisdiction of a federal court over state law claims, stated:

> " . . . State law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. The Court distinguished permissible from nonpermissible exercises of federal judicial power over state law claims by contrasting 'a case where two distinct grounds in support of a single cause of action are alleged, one only of which is federal in character.' In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action."

The application of this standard required identification of the "causes of action" in order to determine the operative scope of the district court's conclusion of law that, since "[a]ll allegations set forth in the Complaint have either been resolved or are presently pending," App. 14, and that thus, the doctrines of *res judicata* and collateral estoppel barred relitigating these issues in this removed complaint. App. 14.

The causes of action specified in the removed complaint are breach of fiduciary duty, negligence, breach of contract,

and conversion. The function of the court is to decide questions of law, and the jury, questions of fact. The court must set the standard of conduct by reference to statutes, rules, principles, and precedent. In the application of the "adjunct" doctrine, a bankruptcy court's powers and authority are limited to acting as a fact-finder as to the circumstances, nature, extent, and consequences in the restructuring of debtor-creditor relations. *Northern Pipeline*, 102 S.Ct. at 2875. "[W]here an action is simply for the recovery . . . of a money judgment, the action is one at law," *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974), quoting *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891). Common law actions requesting money damages as relief, "constitute no part of a proceeding in bankruptcy but concern controversies arising out of it." *Granfinanciera, S.A. v. Nordberg*, 57 U.S.L.W. 4898, 4904 (1989), quoting *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932).

A bankruptcy court's findings of fact concerning a trustee's conduct in implementation of a plan of reorganization and the restructuring of debtor-creditor relations may represent defenses that could be available in a state court action, *Leonard v. Vrooman*, 383 F.2d 556, 560 (1967), but the failure to provide an accounting and to discharge duties required by law with respect to making income tax returns and the payment of taxes cannot be construed as "restructuring debtor-creditor relations."

II. The Provisions Of A Confirmed Plan of Reorganization Cannot Be Construed As Relieving Any Officer Or Agent, Appointed By A Court Of The United States, From The Common Law Duty To Exercise Due Care, Diligence, And Skill In The Custody Of A Fiduciary Estate And The Obligation To Discharge Duties Required By Applicable Laws.

(a) It is not necessary to a surcharge of a trustee's accounts that he shall have been guilty of "gross negligence,

willful default or misconduct." App. 58. It is sufficient that the trustee has failed to discharge a duty required by law. Although the terms of a trust, in proper circumstances, may validly limit a trustee's liability in respect to the administration of the trust, it will not relieve a trustee of responsibility for discharging duties required by law.

> The Tenth Circuit Court of Appeals has held as follows: "It is not necessary to a surcharge of a trustee's accounts that he shall have been guilty of fraud or intentional wrong-doing. It is sufficient that the trustee has failed to discharge a duty required by law. *See* AM.JUR. 2d Trusts, Sections 325, 326 and 510." *In re Johnson*, 518 F.2d 246, 251 (10th Cir. 1975)

Furthermore, a trustee of a corporation may under applicable statutes be *personally* liable for the corporation's liabilities, having failed to file reports required by law, 39 ALR 3rd 428. In the instant case, the trustee's fiduciary duties are defined in Article V, *Creation of Trust*, paragraph 3(w), App. 57, in relevant part, which states that the trustee shall:

> "[d]eal with the Trust Property or any part or parts thereof in all . . . ways as would be *lawful for any person owning the same to deal therewith*, whether similar to or different from the ways above specified at any time or times hereafter." (Emphasis added)

(b) A fiduciary is required by law to act exclusively and solely in the interest of the trust estate and for its beneficiaries. This rule of law *precludes* the conclusion that the standard of a trustee's common law duty of exercising reasonable care in the custody of an estate is in conflict with the duties required by the amended consolidated plan of reorganization filed by The Bank of New York on behalf of the debtors. App. 12. The standard of a trustee's fiduciary duty has been defined as follows:

> "By the common law every trustee or receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate unless relieved of

such duty by agreement, statute, or order of court." *United States Ex Rel. Willoughby, supra* at 450.

The Tenth Circuit, in reviewing case law concerning the standard of fiduciary duty of a trustee, has stated:

> "Generally, the standard is the exercise of *due care, diligence* and *skill* both as to affirmative and negative conduct. Where the trustee is negative or willful and fails to meet the standard of care required of him, he is liable for loss. The standard or measure of care, diligence and skill is that of an ordinarily prudent man in the conduct of his private affairs under similar circumstances and with a similar objective in view." 518 F.2d *supra* at 251.

First, 11 U.S.C. Section 1129 provides that a court shall confirm a plan *only if* the plan complies with the provisions of title 11. 11 U.S.C. Section 1104(a) specifies the statutory requirements for the appointment of a trustee in a case under title 11. App. 153. The duties of a trustee are specifically defined in 11 U.S.C. Section 1106, App. 155. Section 1106 requires a trustee to furnish information concerning tax liabilities to the appropriate governmental taxing authorities. App. 155. Diligence and reasonable care impose a duty upon an agent of any court, vested with substantially all of the property of a corporation, to determine and establish reserves for the payment of statutory tax liabilities incurred during the estate's administration, 11 U.S.C. Section 505, App. 158, *prior* to using the assets of a solvent corporation to pay claims against an insolvent partnership in which the corporation invested as a limited partner.[11] See 11 U.S.C. Section 502(c)(1).

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[11] On October 12, 1987, Arthur Andersen & Co., the Trustee's accountant and tax expert, corresponded with Herbert Stettin, Esq., the Trustee's attorney, and concluded as follows:

> It is quite clear that income was generated by the debtors in possession when taxable events such as sale of the properties in Washington, D.C. and sale of the assets to The Bank of

(Continued on following page)

In the instant case, the Eleventh Circuit's "mootness" ruling, 838 F.2d 1547 (11th Cir. 1988), *cert. denied* 109 S.Ct. 69 (1988), App. 73, will *not* allow the conclusion that the plan's provisions could be construed as an agreement relieving the Trustee of the statutory obligation for the payment of federal and state income taxes incurred during the administration of the estate and arising from the sale of the Miami Center.[12] The Eleventh Circuit's "mootness" ruling, reaffirming its prior opinion that effective judicial relief was precluded on the grounds that the reorganization plan had been substantially consummated, held:

(Continued from previous page)

> New York were completed. As to the matter of how these taxes will be paid is less clear. *If all the assets available to satisfy these claims are held by the trust, it seems that reserves should be established.*" (Emphasis added)

[12] Defendant Smith, the Trustee, in a colloquy before the bankruptcy court, has acknowledged that he did not exercise reasonable care and manage the property in his possession "in the same manner that the owner or possessor thereof would be bound to do if in possession thereof" and as required by the Plan's Article V, paragraph 3(w):

MR. GOULD: "Does the Bank of New York plan provide that you do not have a fiduciary duty to determine the amount of the debtors' . . . federal and state tax liability?"

MR. SMITH: "No."

MR. GOULD: "Does anything in the Bank of New York's plan state that you do not have the responsibility to prepare the debtors' tax returns?"

MR. SMITH: "No."

MR. GOULD: "Does anything in the bank's plan state that you do not have the responsibility to establish reserves for the payment of the debtors' federal and state income tax liabilities?"

MR. SMITH: "No."

[Bkrtcy., Transcript, February 1, 1988, pp. 93-94]

> "The court also found that it had had the unusual opportunity to observe the substantial consummation of the reorganization plan and that its 'fairness, feasibility and propriety' had been verified by these occurrences: *administrative claims had been paid or reserved*; secured claims had been paid in full; class 3 claims had been paid in full; undisputed claims in classes 4 through 6 had been paid in full and funds reserved for disputed claims; several disputed claims had been compromised, saving the estates millions of dollars; *there remained sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants* . . . " App. 82.

11 U.S.C. Section 503(b)(l)(B) provides for the payment of any tax incurred by the estate as an administrative expense. No provision, however, was made for the payment of federal and state income taxes incurred during the administration of the estate. No provision was made for the repayment of "super-priority" loans secured by liens superior to administrative expenses. Adequate means were not provided to cure defaults in unexpired leases. See 11 U.S.C. Section 1123(a)(5)(G). Adequate protection was not provided for the purchase of the interest in property owned by entities other than the estate. 11 U.S.C. Section 361(3). No provision was made for the payment in full or in part of improperly subordinated claims of Affiliated Creditors. 11 U.S.C. Section 510(c).

The Eleventh Circuit relying upon the "clearly erroneous" standard of review deferred to the bankruptcy court's adoption *in toto* of The Bank of New York's proposed findings of fact, but without credibility determinations based upon the testimony of witnesses or the introduction of documentary or physical evidence. The Eleventh Circuit dismissed the debtors' appeal of the bankruptcy court's Amended Confirmation Order and the order substantively consolidating the debtors' estates, in accordance with the provisions of the amended plan of reorganization, proposed by The Bank of

New York on behalf of the debtors. The bankruptcy court adopted the following pertinent findings:

> "[T]he court finds that substantive consolidation in the *minimal form* proposed by the Bank is equitable, is in the best interest of the creditors, and . . . *does not unfairly prejudice the debtors*. As provided by the Bank's Plan, each debtor will retain its individual name, form of organization, and *the right to continue business, after discharge. The debtors will not disappear in a merger-like consolidation* as is sometimes so in such cases." (Emphasis added)
>
> "Confirmation of the Bank's Plan is *not* likely to be followed by the *liquidation* or *the need for further financial reorganization*, of the debtors or any successors to the debtors under the Bank's Plan, except to the extent that liquidation or reorganization is proposed by the Plan." (Emphasis added)

[The Eleventh Circuit specifically cited the following further finding of fact for the Court's conclusion that effective judicial relief could not be granted:

> " . . . the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141." App. 83.

11 U.S.C. Section 1141 and its legislative history, however, preclude the conclusion that tax payments which become due *after* a petition has been filed on income earned during the bankruptcy court's administration of an estate or from the sale of property of the estate are dischargeable. 11 U.S.C. Section 1129 requires that a bankruptcy court assure itself that reorganization will succeed, and that therefore adequate funds are provided for the payment of federal and state taxes incurred during the administration of the estate and arising from the sale of property in accordance with the provisions of a plan of reorganization.

The intent of Congress is clear that "the tax collector . . . should not lose taxes which he has not had reasonable

time to collect. . . ." Likewise the debtor's "fresh start" should not be burdened with an accumulation of such taxes, S. Rep. No. 989, 95th Cong., 2nd Sess. 13-14, which a bankruptcy court restrained him from paying by vesting possession of substantially all of the property of his estate in a trustee appointed as the court's agent for the purpose of carrying out the provisions of a plan of reorganization. App. 54.

Second, no statute has relieved an agent appointed by a court of the United States of the common law duty to exercise reasonable care in the preservation of the fiduciary estate in his possession. The applicable statutory requirements of 26 U.S.C. Sections 6012(b)(3) and (4), 26 U.S.C. Section 7701(a)(6), and the related Treasury regulations are clear and unambiguous. Obviously, no statute could be construed as relieving an agent of a bankruptcy court of the common law duty to exercise reasonable care and due diligence for the fiduciary estate in his trust by establishing a reserve for the payment of nondischargeable Federal and state income taxes on income earned by solvent fiduciary estates in his custody, *prior* to the payment of claims against an insolvent estate. 28 U.S.C. Section 960 and its legislative history preclude a bankruptcy court from relieving any officer or agent of such a court from the obligation for the payment of federal and state taxes on income earned and received as a fiduciary. App. 144.

Similarly, no statute provides the basis for allowing the holder of an *undersecured* claim to have taken a credit for postpetition interest based upon the provisions of a plan granting a secured creditor unmatured interest on its allowed secured claim. See 11 U.S.C. Section 502(b)(2). 11 U.S.C. Section 506(b) precludes a bankruptcy court from allowing postpetition interest to an undersecured holder of a secured claim. App. 157.

Also, no statute provides the basis upon which a fiduciary is relieved of the duty to provide a prompt accounting of the assets of the various beneficiaries of the fiduciary estate,

or is allowed to commingle the assets of the various beneficiaries. A remedy for limiting, if not avoiding a trustee's personal liability for matters which involve difficult questions of judgment, is to account at prompt intervals, placing the burden upon objectors to raise their objections. *Mosser v. Darrow*, 341 U.S. 267, 274 (1950).

"Gross negligence, willful default, or misconduct" are *not* the criteria for determining the personal liability of a fiduciary for conduct adverse to a fiduciary estate. The guidelines of *Mosser v. Darrow* are that "[e]quity tolerates in bankruptcy trustees no interest adverse to the trust," *Id.* at 271. As Justice Jackson concluded:

> Courts are quite likely to protect trustees against heavy liabilities for disinterested mistakes in business judgment. But a trusteeship is a serious business and . . . [T]he most effective sanction for good administration is personal liability for the consequences of forbidden acts." *Id.* at 273.

As a general proposition, a fiduciary in the administration of an estate is under the duty of acting exclusively and solely in the interest of the trust estate and not in the interest of any third person.

In *Mosser*, it was held that a trustee, although making no personal profit, could be surcharged. The Court concluded:

> "We see no room for the operation of the principles of negligence in a case in which conduct has been knowingly authorized. . . .The liability here is not created by a failure to detect defalcations, in which case negligence might be required to surcharge the trustee, but is a case of the willful and deliberate set up of an interest . . . adverse to that of the trust." *Id.* at 272.

In the present case the trustee's seeking and obtaining indemnification from The Bank of New York, holding himself personally harmless, prior to executing the Amended Contract of Sale and implementing the plan was a willful and deliberate process adverse to third party creditors and the fiduciary trust's beneficiaries in remainder. The orderly liquidation of a

corporation's assets to pay its liabilities requires the payment of its income taxes prior to the use of its funds to pay claims against another debtor.

The Sixth Circuit's decision in *Louisville Property Co. v. Commissioner of Internal Revenue*, 140 F.2d 547 (6th Cir. 1944), is a seminal case in the determination of a non-bankruptcy trustee's fiduciary duty as an assignee of corporate property to make the corporate income tax return and to pay the corporate taxes, after the corporation has been divested of its property. The court stated:

> "The corporation could not, by assignment, divest itself entirely of beneficial interest in the property, nor free itself of obligations to creditors and stockholders. *It was still in being, could sue and be sued, and in its name enforce the obligations of the assignee.*" (Emphasis added) 140 F.2d at 549.

In the instant case the plaintiffs had the right to sue Fred Stanton Smith, as the assignee of their property, and enforce the Trustee's obligations in an independent and impartial forum. Practice is well established that if the Trustee had sought instructions from the court, given notice to the United States, creditors, and the fiduciary estate's beneficiaries, with respect to difficult questions of judgment, *prior* to commencement of distribution, the Trustee could have effectively protected himself against personal liability. Instead, claims with subordinate priority against MCLP were paid in full, plus interest, without first having established reserves for the payment of Holywell Corporation's liabilities, including federal and state income taxes.

III. A Court Of The United States Does Not Have The Authority To Deprive A Litigant Of His Right To A Trial By Jury In A Lawsuit With Respect To Any Of The Acts Or Transactions Of A Fiduciary, Appointed By Such A Court, Concerning The Business Connected With Property Vested In His Possession, In Accordance With The Provisions Of A Plan Of Reorganization.

(a) When the beneficiaries of a fiduciary estate sue a trustee and his indemnitor in state court for breach of fiduciary duty, seeking damages for conduct adverse to a fiduciary estate, a bankruptcy court does not have the power and authority to protect the trustee. As a matter of law, the plain meaning of 28 U.S.C. Section 959(a) is that the bankruptcy court's approval was *not* required to sue the Trustee for his breach of fiduciary duty in the courts of the State of Florida. The bankruptcy court's equitable powers could not be construed as depriving the plaintiffs of their right to such a trial by jury.

(b) A court of equity cannot take jurisdiction of a suit in which a claim properly cognizable only at common law is united in the same proceeding with a claim for equitable relief. This Court's analysis of the Seventh Amendment, App. 108, has distinguished between legal claims, those seeking a judgment for money damages, and claims which seek the exercise of a court's equitable jurisdiction. *Dairy Queen, Inc. v. Wood*, 82 S.Ct. 894 (1962), citing *Scott v. Neely*, 140 U.S. 106, 117 (1891), held:

> "that a court of equity could not even take jurisdiction of a suit 'in which a claim properly cognizable only at law is united in the same proceeding with a claim for equitable relief.' That holding . . . was based upon both the historical separation between law and equity and the duty of the Court to insure 'that the right to a trial by jury in the legal action may be preserved intact'."

Thus, a right to a jury trial exists if the issue would have been tried in a court of law. If the claim is *solely* for equitable relief, there is no right to a jury trial.

If a complaint alleges, among other things, breach of fiduciary duty, negligence, breach of contract, and conversion – all issues cognizable and arising *only* under state common law – and, as in this case, the respondents in defense seek equitable relief based solely upon the provisions of a confirmed plan of reorganization, the constitutional right to a trial by jury is *not* lost. All ambiguities must be decided in favor of providing a jury trial. *Ross v. Bernhard*, 396 U.S. 531 (1970), states, in relevant part, as follows:

> "The Seventh Amendment preserves to litigants the right to jury trial in suits at common law – 'not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . .In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.' *Parsons v. Bedford, Breedlove & Robeson*, 3 Pet. 433, 447, 7 L.Ed. 732 (1830)" *Id.* at 533.

The plurality opinion in *Northern Pipeline* concluded that a claim for damages arising from a breach of contract and misrepresentation involved a right created by state law, independent and antecedent of the reorganization petition conferring jurisdiction on a bankruptcy court. The Court held as follows:

> "[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.

> Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. *No comparable justification exists, however, when the right being adjudicated is not of congressional creation.* In such a situation, substantial inroads into functions that have traditionally been performed by the judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts." (Emphasis added) 102 S. Ct. at 2878.

Notwithstanding the constitutional powers and authority of Congress to establish uniform laws on the subject of bankruptcy, and the bankruptcy court's power to hear and decide state-law counterclaims against a creditor who files a claim in bankruptcy when those counterclaims arise from the same transaction, *Katchen v. Landy*, 382 U.S. 323 (1966), the constitutional right to a trial by jury in a common law action cannot be *denied* on the basis of the alleged rule that Congress may accommodate the right to a trial by jury in a "core" proceeding to the need for expeditious proceedings, based upon the equitable nature of a bankruptcy proceeding.

As this Court, reiterating its prior teachings, stated in *Granfinanciera:*

> "On the common law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself." *Atlas Roofing Co. v. OSHA Rev. Comm.*, 430 U.S. at 450, n. 7, quoting *Crowell v. Benson, supra* at 51.
>
> "If a statutory right is not closely intertwined with the federal regulatory program Congress has power to enact and if that right neither belongs to nor exists against the Federal Government then it must be adjudicated by an Article III court. [f.n. omitted] If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial." 57 L.W. at 4904.

CONCLUSION

The conduct of the proceedings below so far departs from the accepted standard of the judicial process in the United States that, unless this Court issues a writ of certiorari and exercises its supervisory powers, Petitioners will have been denied the fundamental rights of civil liberty to claim the protection of the law. It is a right of the individual to have open access to the courts and impartial judgment, insuring a lawful remedy for injuries to person and property. It is the duty and obligation of the courts to insure that justice prevails. This constitutional guarantee secures the individual against the arbitrary acts and usurpation of power by any office holder. See 16A C.J.S. Section 708. Constitutional Law, xiii. *Right To Justice And Remedy For Injuries.*

A government of laws imposes a duty and an obligation upon each person to observe its written laws. If the judges of a court engage in a concerted action, disavowing a fiduciary's common law duty and the written laws of the United States, and their judgments are based upon the court's discretion, a reasonable person could not avoid the conclusion that the court's purpose was to protect its agent from damages related to wrongful conduct in failing to discharge the requirements of law.

In the bankruptcy proceedings below, the amended consolidated plan of reorganization, filed by the Bank of New York on behalf of the debtors, was confirmed *without* a confirmation hearing. See *11 U.S.C. Section 1128(a).* The bankruptcy court did not satisfy the requirements of 11 U.S.C. Section 1129(a) that the court shall confirm a plan "*if and only if*" all of the enumerated requirements are met. H.R. Rep. 95-595, 95th Cong. 1st Sess. (1977) at 412.

Section 1129(a)(2) requires that the plan's proponent comply with the provisions of title 11, notably the disclosure requirements of Section 1125. The Bank of New York, as the Plan's proponent, did not disclose that no provision had been made for the payment of federal and state income taxes

incurred during the administration of the estate and that no provision was made for the repayment of "super-priority" loans previously authorized by the bankruptcy court. The standard for the determination of the fairness of a plan of reorganization was not satisfied, since there was no "determination of what assets are subject to the payment of the respective claims." *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 520 (1940). In a related appeal of the bankruptcy court's Confirmation Order, the district court held that the plan of reorganization, proposed by The Bank of New York on behalf of the debtors, was unfair and inequitable to insiders' claims, and thus, did not satisfy the requirements of 11 U.S.C. Section 1129(b) (1). Thereupon, the district court *reversed* the Confirmation Order as applied to the claim of Miami Center Joint Venture (not an affiliate of the debtors).

Notwithstanding that the Eleventh Circuit's "mootness" ruling was based upon the bankruptcy court's conclusion of law that "the debtors were discharged under Code Section 1141," App. 83, various judges of the district court have concluded that the plan provided for liquidation of substantially all of the property of the estates, see 11 U.S.C. Section 1141(d)(3), App. 151, and that an individual appointed, *after* confirmation as the court's agent has authority to liquidate the assets of nondebtor solvent corporations, *without* payment of their liabilities, merely because their parent stockholder was a debtor.

Orders of the bankruptcy court no longer subject to appeal have been disavowed concerning the determination and payment of income taxes. Orders concerning the repayment of "super-priority" loans, authorized by the bankruptcy court *prior* to the plan's confirmation, have been nullified. A claim with a priority superior to the Bank of New York's liens still remains unpaid, and carrying costs related to the claim's nonpayment have been imposed upon the estate. The Trust's administrative expenses have been imposed as a burden upon

the estate, App. 58, contrary to the "equitable fund" doctrine codified in 11 U.S.C. Section 506(c). App. 157.

The bankruptcy court exercised its equitable powers under 11 U.S.C. Section 105(a) and Section 1123(b)(5) to appoint a trustee as the court's agent *without* having satisfied the statutory requirements of 11 U.S.C. Section 1104(a) *before* confirmation of the amended consolidated plan of reorganization. Notwithstanding that 11 U.S.C. Section 105(b) and its legislative history preclude the appointment of a "receiver" under any circumstances in a case under title 11, App. 160, the "liquidating trustee" appointed as the court's agent for carrying out the plan's provisions was granted all the powers and authority of a "receiver." App. 54.

More than four years have elapsed since the Plan's Effective Date and the entry of an order of substantial consummation. The Plan has not been implemented. The case has not been closed. The assets of the various estates have been commingled. Federal and state income tax returns have not been filed and no reserve has been established for the payment of income taxes incurred during the administration of the estate and arising from the sale of the estate's property.

For the foregoing reasons this Court should grant the Writ, reverse the judgment of the court below, and instruct the Eleventh Circuit Court of Appeals to direct the district court to remand this case to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

Respectfully submitted,

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORP., CHOPIN ASSOCIATES,
AND HOLYWELL CORPORATION

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APPENDICES

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APPENDIX A

United States Court of Appeals

For the Eleventh Circuit

No. 88-6187
Non-Argument Calendar

D.C. Docket No. 88-1302

IN RE: HOLYWELL CORPORATION, et al.,

Debtor.

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES and HOLYWELL CORPORATION,

Plaintiffs-Appellants,

versus

BANK OF NEW YORK, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before FAY, KRAVITCH and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the orders of the District Court appealed from, in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 7, 1989
For the Court: Miguel J. Cortez, Clerk

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-6187

IN RE: HOLYWELL CORPORATION, et al.,

Debtor

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
THEODORE B. GOULD,
CHOPIN ASSOCIATES and
HOLYWELL CORPORATION,

Plaintiffs-Appellants,

BANK OF NEW YORK, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion July 7, 1989, 11 Cir., 198___, ___ F.2d ___).
(August 29, 1989)

Before FAY, KRAVITCH and JOHNSON, Circuit Judges.

PER CURIAM:

(✔) The Petition(s) for Rehearing and DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-6187
Non-Argument Calendar

D.C. Docket No. 88-1302
IN RE: HOLYWELL CORPORATION, et al.,

Debtor.

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES and HOLYWELL CORPORATION,

Plaintiffs-Appellants,

versus

BANK OF NEW YORK, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(July 7, 1989)

Before FAY, KRAVITCH and JOHNSON, Circuit Judges.

PER CURIAM:

This is an appeal from the order of the United States District Court for the Southern District of Florida entered on March 2, 1988, that affirmed and adopted the bankruptcy court's report and recommendation on a petition for removal and motion for remand. The appeal also is from the district court's final order entered in a related

appeal, Case No. 88-1302-Civ-Spellman, on October 31, 1988, that affirmed the bankruptcy court's order granting motions to dismiss and dismissing an adversary complaint that had been previously removed from the Eleventh Judicial Circuit for Dade County, Florida.

We AFFIRM both the order of the district court entered on March 2, 1988, and the order in the related appeal entered on October 31, 1988.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT COURT OF FLORIDA

HOLYWELL CORPORATION, et al.

CASE NO. 88-1302-SPELLMAN

_____/

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES and HOLYWELL CORPORATION
Appellants,

-vs-

THE BANK OF NEW YORK, CITY NATIONAL BANK OF MIAMI as Trustee under Land Trust #5008793, M.C. HOLDING PARTNERS, a New York General Partnership, and its General Partners, namely ROBANK CORPORATION, H.D. LIQUIDATION, INC. BOTT FLORIDA HOLDING CORPORATION, AMERICAN SECURITY, LTD., and M. CENTER CORPORATION, and FRED STANTON SMITH, individually and as Trustee of the MIAMI CENTER LIQUIDATING TRUST,
Appellees.

_____

Bankruptcy Case Nos.
84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

MEMORANDUM OPINION

ORDER AFFIRMING BANKRUPTCY COURT

THIS CAUSE comes before the Court upon the Appellants, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD, appeal of the *Order Granting Motions to Dismiss and Dismissing Adversary Complaint* entered by the United States Bankruptcy Court for the Southern District of Florida on May 12, 1988.

A. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are subject to the clearly erroneous standard. *Briden v. Foley*, 776 F.2d 379 (1st Cir. 1985). Questions of law are subject to the *de novo* standard of review. 11 U.S.C. Bankruptcy Rule 8013: *Anderson v. Bessemer City, N.C.*, 470 U.S. 564 (1085).

B. BACKGROUND

The Defendants originally filed this action in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida against Fred Stanton Smith (the "Liquidating Trustee") individually and as trustee of the Miami Center Liquidating Trust, the Bank of New York ("BNY"), City National Bank of Miami, M.C. Holding Partners, a New York general partnership and its general partners, Robank Corp., H.D. Liquidation, Inc., Zentac Investments, Inc., BOTT Florida Holding Corp., American Security Ltd. and M Center Corporation.

The Complaint alleged negligence (Count I), Breach of Fiduciary Duty (Count II), Discharge of Trustee (Count

III), Breach of Contract (Count IV), and Conversion (Count V). The Defendants filed a Petition for Removal of the State Court Action to the Bankruptcy Court under 28 U.S.C. § 1452 and Bankruptcy Rule 9027. The Debtors moved for remand. The Bankruptcy Court heard the Application for Removal and the Motion for Remand on December 15, 1987, and found that the underlying issues set forth in the Complaint were "core" matters under 28 U.S.C. §157. The Bankruptcy Court recommended that this Court certify the Petition for Removal and deny the Motion for Remand. This Court affirmed and adopted that Report and Recommendation. *Holywell v. Bank of New York*, Case No. 88-0034-CIV-EPS.

The Defendants filed a motion in the Bankruptcy Court to dismiss the Complaint and for sanctions. The Bankruptcy Court granted the Motion to Dismiss on the following grounds: 1) the Complaint failed to sufficiently allege that the Liquidating Trustee was guilty of gross negligence, willful default, or misconduct; and 2) all matter set forth in the Complaint had either been resolved by the Bankruptcy Court in other adversary proceedings or motions (which rulings either constitute final orders or are presently on appeal), or are the subject of pending adversary proceedings or motions which will be determined by the Bankruptcy Court. The Bankruptcy Court denied the motion for sanctions on the ground that at the time the action was filed in state court, certain issues raised in the Complaint were not subject to a prior judicial determination.

The Complaint, which is characterized by the Debtors as a common law action for a breach of fiduciary

duty by the Liquidating Trustee, is based on the following alleged improper conduct of the Liquidating Trustee:

1) the granting to BNY of a credit of $27,050,115.02 representing a claim for accrued post-petition interest;

2) the failure of the Liquidating Trustee to resolve certain post-closing adjustments in favor of the Debtor, including an alleged credit to MCLP for the completion of leasehold improvements, an alleged reduction in the credit granted BNY for 1985 real estate taxes, and an alleged reduction in the credit granted BNY for an allowance of construction materials;

3) the failure of the Liquidating Trustee to establish a reserve for the payment of income taxes;

4) the failure of the Liquidating Trustee to provide a reserve to pay certain alleged super-priority loans due to the Plaintiffs from MCLP;

5) the failure of the Liquidating Trustee to sue BNY as an "employer in fact" under Internal Revenue Section 3505 to recover from BNY withholding taxes which were paid by the Liquidating Trustee to the Internal Revenue Service;

6) the consent of the Liquidating Trustee to the establishment of an escrow account to provide for the payment of certain real estate taxes owed to Dade County, Florida;

7) the failure by the Liquidating Trustee to pay claims of affiliated creditors including creditors classified as Class 8 creditors under the Plan of Reorganization, the failure to pay Chopin alleged ground rent due in the amount of $5.3 million, the failure to pay the claim of Miami Center Joint Venture ("MCJV") and the failure to

pay other administrative claims of affiliated creditors.

Article V of the Plan contemplated the establishment of the Miami Center Liquidating Trust and the appointment of the Liquidating Trustee to implement the provisions of the Plan and "hold, liquidate and distribute such Trust Property according to the terms of this Plan." The Plan provided for the substantive consolidation of the Debtors and for the subordinate classification of claims of all affiliated or debtor-related entities. The Plan also provided for a separate mechanism of the payment of the claim of Olympia & York ("O&Y"), a partner of Plaintiff Gould in MCJV, in the even that the subordinated classification of the claim of MCJV was reversed on appeal.

The Plan was confirmed by order (the "Confirmation Order"), and became effective on October 10, 1985. This Confirmation Order was subsequently affirmed on appeal. *Holywell Corp. v. Bank of New York,* 59 B.R. 340 (Bankr. S.D. Fla. 1986). The Eleventh Circuit Court of Appeals vacated and remanded, holding that the Plan was "substantially consummated at the time the appeal was heard by the District Court" and directing the District Court to dismiss the appeal as moot. *Miami Center Limited Partnership v. Bank of New York,* 838 F.2d 1547 (11th Cir. 1988).

The parties in this case have filed various adversary proceedings in the Bankruptcy Court since the entry of the Confirmation Order. Those proceedings include collateral attacks on the various aspects on the Plan as well as requests for clarification and guidance by the Liquidating Trustee.

C. *ISSUES*

There are three major issues which this Court must address:

> 1) whether the Bankruptcy Court properly dismissed the complaint alleging common law breach of fiduciary duty, where a provision of the confirmed plan or reorganization established a standard of "gross negligence, willful default or misconduct" to establish the Trustee's liability for breach of fiduciary duty;
>
> 2) whether the Bankruptcy Court properly ruled that all matters set forth in the Complaint had either been resolved by the Bankruptcy Court in other adversary proceedings or motions (which rulings either constitute final orders or are presently on appeal), or were the subject of pending adversary proceedings or motions;
>
> 3) whether the Bankruptcy Court had subject matter jurisdiction over this action, where the Plaintiffs alleged a constitutional right to trial by jury.

After *de novo* review, this Court hereby affirms the Bankruptcy Court's dismissal of the Complaint and sets forth its findings as follows:

1. *The Confirmed Plan of Reorganization Establishes the Law of the Case*

The Appellants argue that although the Plan sets forth a standard of gross negligence, willful default or misconduct for breach of fiduciary duty, the correct standard in a common law action is due care, diligence and skill. The Appellants argue that the Bankruptcy Court can not limit this common law duty even where a trust

expressly limits liability. *U.S. ex rel Willoughby v. Howard*, 445 U.S. 442 (1937). In *Willoughby*, the Court stated that "[b]y the common law every trustee or receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate unless relieved of such duty of agreement, statute, or order of court." *Id.* at 450. The Court went on to say that the fact that a fiduciary's freedom of choice was limited by statute did not relieve that fiduciary from the common law duty of "exercising care and prudence within the field left to his discretion." *Id.* at 452.

In the case *sub judice*, the allegations of misconduct refer not to "the field left to [the trustee's's] discretion" but rather to duties that were required by the Confirmed Plan of Reorganization. The Appellants assert that the Plan established a minimum standard of care, and that the Trustee was still liable *under a common law duty* to a higher standard.

This argument overlooks the fact that the Appellants are not claiming that the Trustee breached his common law duty while acting within the provisions of the Plan, but rather that his actions under the Plan *themselves* breached his common law duty. Thus the two standards here are in direct conflict.[1] The question is therefore not whether the Plan relieved the Trustee of his common law duty, but whether the duties required by the Plan were controlling.

---

[1] The Appellants' allegations are in direct conflict with the Bankruptcy Court's rulings under the Plan. Those rulings are discussed in detail under Section 2 of this Order.

As stated above, *Willoughby* held that a trustee has the common law duty of exercising reasonable care "unless relieved of such duty by agreement, statute, or order of court." *Willoughby* at 450. Here, such agreement did exist. The provisions of a confirmed plan bind all parties whose rights are affected by the plan, regardless of whether they voted to accept it. *In re Sanders*, 81 B.R. 496, 499 (Bankr.W.D. Ark. 1987). "Once the confirmed plan has become consummated, it becomes the law of the case." *In re Jartran, Inc.*, 76 B.R. 123, 125 (Bankr.N.D. Ill. 1987). Further, "a party in interest . . . is bound by the terms of the plan when confirmed, even if the plan ultimately provides it with less than that to which it is otherwise entitled." *In re St. Louis Freight Lines, Inc.*, 45 B.R. 546, 552 (Bankr.E.D. Mich. N.D. 1984). Thus, where the allegations contained in the Complaint involve duties required under the Plan, those duties control and the Trustee is relieved of personal liability for any conflicting duties under the common law.

2. *All Allegations Set Forth in the Complaint Have Either Been Resolved or Are Presently Pending*

The Appellants allege breach of specific duties by the Trustee. As discussed below, each alleged breach has been fully litigated or is presently pending appeal. The Appellants are barred by both *res judicata* and collateral estoppel from relitigating these issues in this action.

a. *granting BNY a credit of $27,050,115.02 representing a claim for accrued post-petition interest*

The Bankruptcy Court previously held that this credit was valid under the Plan and that BNY was not an "unsecured creditor." *Adv. Proc. No. 87-0523-BKC-SMW-A.* On Appeal District Court held that allowance of the credit for post-petition interest to BNY was an integral part of the Plan and that all aspects of the Plan were valid, legally binding on all parties, and insulated from further attacks. *Holywell v. Fred Stanton Smith and The Bank of New York,* Case No. 88-151-CIV-SMA.

b. *failure to resolve certain post-closing adjustments in favor of the Debtor*

The issue is presently pending before the Bankruptcy Court. *Adv. Proc. No. 87-0523-BKC-SMW-A.* This action was brought by the Trustee and the Debtors attempted to have the matter dismissed on the grounds that the Bankruptcy Court lacked jurisdiction over these post-confirmation matters. The Bankruptcy Court rejected this argument and refused to dismiss the action.

c. *failure to establish a reserve for the payment of income taxes*

The Bankruptcy Court held that the Trustee was not responsible for the filing of federal income tax returns on behalf of the Debtors or liable to the United States for the payment of any federal taxes. *Adv. Proc. No. 87-0627-BKC-SMW-A.* An appeal of this ruling is presently pending.

United States of America v. Fred Stanton Smith, Case No. 88-0795-CIV-JWK.

d. *failure to provide a reserve to pay certain alleged super-priority loans due to the Plaintiffs from MCLP*

These super-priority loans are inter-debtor loans and loans made to a wholly-owned non-debtor subsidiary of Holywell. The Debtors have already filed an action in the Bankruptcy Court to require payment and that court has held that the loans are entitled to super-priority status but that payment can only be made from Miami Center Limited Partnership assets. *Case No. 84-01590-BKC-TCB.* This Order is presently on appeal. *Bank of New York,* Case No. 87-0970-CIV-JWK.

e. *failure to sue BNY as an "employer in fact" to recover withholding taxes which were paid to the Internal Revenue Service*

The Bankruptcy Court considered the issue of whether a party, other than IRS, could sue BNY to establish liability under the Code as an employer-in-fact. The court dismissed that complaint and held that only the IRS could bring such an action *Adv. Proc. 88-0158-BKC-SMW-A.* This ruling is presently pending on appeal.

f. *establishment of an escrow account to provide for the payment of certain real estate taxes*

The Bankruptcy Court entered an Order stating that the escrow fund established for the 1982-1984 real estate taxes was to continue for the specific purpose of paying

any ad valorem taxes that were ultimately determined to be due and directed that the escrow be transferred to counsel for BNY and counsel for the Trustee as escrow agents. *Adv. Proc. No. 87-0618-BKC-SMW.*

g. *failure to pay claims of affiliates creditors*

The treatment of the claims of affiliates of the Debtors is governed by the Plan which provides for the subordinate classification of these claims. The Plan also provides a mechanism for the determination and payment of the MCJV claim and the Bankruptcy Court entered a final judgment determining the amount of those claims. *Adv. Proc. 87-0255-BKC-SMW-A.*

3. *The Bankruptcy Court Has Subject Matter Jurisdiction Over this Action*

This Court previously held that the Bankruptcy Court had subject matter jurisdiction over this action in its Order Affirming and Adopting the Bankruptcy Court's Report and Recommendation on Petition for Removal and Motion for Removal. *Holywell v. Bank of New York,* Case No. 88-0034-CIV-EPS. That Order held that the claims set forth in the complaint were "core matters" under 28 U.S.C. § 157 and that the Bankruptcy Court had the authority to hear and determine the claims. This Court sees no reason to revisit this matter which was fully litigated in the aforementioned proceeding. Further, this Court's above finding that the Plan establishes the law of this case and that this action therefore fails to state a cause of action renders this issue moot. Accordingly, it is hereby

ORDERED AND ADJUDGED that this Order of the Bankruptcy Court dismissing the Complaint is AFFIRMED.

DONE AND ORDERED in Chambers at Miami, Florida this 31 day of Oct. 1988.

/s/ Eugene P. Spellman
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

HOLYWELL CORPORATION, et al.,	CASE NO.: 84-01590/91/92/93/94 BKC SMW A
Debtors,	
MIAMI CENTER LIMITED PARTNERSHIP, etc., et al.,	ADV. NO: 87-0546 BKC SMW A
Plaintiffs,	
-vs-	
BANK OF NEW YORK, et al.,	
Defendants.	

ORDER GRANTING MOTIONS TO DISMISS AND DISMISSING ADVERSARY COMPLAINT

THIS CAUSE having come on to be heard on May 9, 1988 upon motion of Fred Stanton Smith individually, and as Liquidating Trustee of the Miami Center Liquidating Trust to dismiss the Adversary Complaint pending before the Court, and upon motion of the Bank of New York to Dismiss the Adversary Complaint pending before the Court, and for sanctions against the Plaintiffs, and the Court having reviewed the pleadings on file, having heard argument of counsel, and being otherwise fully advised in the premises, it is hereupon

ORDERED AND ADJUDGED as follows:

1. The motion to dismiss of Fred Stanton Smith individually be the same is hereby granted. The complaint contains no sufficient allegations that Fred Stanton Smith was guilty of gross negligence, willful default or misconduct, as provided Article 5, Paragraphs 7 and 8 of Confirmed Amended Consolidated Plan of Reorganization. Such allegations are required to establish individual liability under the terms of the Plan.

2. The motion to dismiss of Fred Stanton Smith as Liquidating Trustee of the Miami Center Liquidating Trust be and the same is hereby granted upon the ground that all matters contained in the Adversary Complaint have either been resolved by this Court in other pending adversary complaints or motions which were heard before the Court (and which rulings are presently on appeal) or are the subject of pending adversary proceedings or motions and which will be resolved in ordinary course.

3. The motion to dismiss of the Bank of New York is granted upon the same grounds as stated above concerning the motion to dismiss of Fred Stanton Smith as Liquidating Trustee of the Miami Center Liquidating Trust.

4. The motions for sanctions against the Plaintiffs are denied, based upon the Court's finding that the Adversary Complaint was originally filed on or about October 15, 1987 at a time when the matters involved had not been resolved.

DONE AND ORDERED in Chambers at Miami, Florida this 12 day of May, 1988.

/s/ Sidney M. Weaver
U.S. BANKRUPTCY JUDGE

Conformed copies:

Herbert Stettin, Esq.
will immediately mail
conformed copies to
all counsel of record
upon receipt of signed
order from the Court

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

In re:
HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES and
THEODORE B. GOULD,
_____/

CASE NO. 88-0034-SPELLMAN

ORDER AFFIRMING AND ADOPTING BANKRUPTCY COURT'S REPORT AND RECOMMENDATION OF PETITION FOR REMOVAL AND MOTION FOR REMAND

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION,
THEODORE B. GOULD,
CHOPIN ASSOCIATES,
HOLYWELL CORPORATION,
Plaintiffs,

-vs-

BANK OF NEW YORK, CITY NATIONAL BANK OF MIAMI, etc.,
Defendants.

_____

THIS CAUSE comes before the Court upon a *de novo* review of Defendants' Petition for Removal and Plaintiffs' Motion for Remand. United States Bankruptcy Judge Sidney M. Weaver, in his Report on Petition for Removal and Motion for Remand, recommended that the petition for removal be granted and the motion for remand be denied. Plaintiffs filed objections to the Bankruptcy

Judge's Report and Defendants filed their Memorandum in support of removal. After a hearing held in the above-styled case and after careful review of the pleadings and the record herein, it is clear that this Court has jurisdiction over the CAUSE pursuant to 28 U.S.C. section 1334 and as such removal from the state court was proper under 28 U.S.C. section 1452. Further, because this Court is satisfied that the claims set forth in Plaintiffs' complaint are core matters under 28 U.S.C. section 157 the Bankruptcy Court properly has subject matter jurisdiction and authority to hear and determine the claims presented. Accordingly, it is hereby

ORDERED AND ADJUDGED that this Court ADOPTS AND AFFIRMS the recommendation of the Bankruptcy Judge and GRANTS the petition for removal and DENIES the motion for remand.

DONE AND ORDERED in Chambers at Miami, Florida this 2 day of MAR, 1988.

/s/ Eugene P. Spellman
UNITED STATES DISTRICT JUDGE

cc: all counsel of record
The Honorable Sidney M. Weaver

APPENDIX G

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF FLORIDA

In Re:	:	CASES NO.
HOLYWELL CORPORATION, et al.,	:	84-01590-BKC-SMW 84-01591-BKC-SMW 84-01592-BKC-SMW 84-01593-BKC-SMW 84-01594-BKC-SMW
Debtors.	:	
MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES, and HOLYWELL CORPORATION,	:	ADV. PROC. NO. 87-0546-BKC-SMW-A (Removed Circuit Court Case No. 87-44662)
Plaintiffs,	:	
v.	:	
THE BANK OF NEW YORK, CITY NATIONAL BANK OF MIAMI, as Trustee under Land Trust #5008793, et al.,	:	
Defendants.	:	

REPORT ON PETITION FOR REMOVAL AND MOTION FOR REMAND, AND ORDER ON MOTIONS TO DISMISS

THIS ADVERSARY PROCEEDING was heard on December 15, 1987, on:

(a) The petition by The Bank of New York, et al., for the removal of Dade County Circuit Court Case No. 87-44662, *Miami Center Limited Partnership, et al., v. The Bank of New York, et al.*, to this Court;

(b) The Debtors' Motion for Remand of that State court case; and

(c) Motions to Dismiss the Complaint as removed, and for sanctions, by the Liquidating Trustee and the Bank.

Having reviewed the pleadings and heard argument of counsel, and being otherwise fully advised, it is hereby ORDERED AND ADJUDGED that:

1. The matters in the state court action sought to be removed are "core" matters under 28 U.S.C. §157 over which this Court has jurisdiction.

2. The matters in that state court action are matters relating to the implementation and administration of the plan of reorganization confirmed by this Court and affirmed by the District Court.

3. In accordance with 28 U.S.C. §1452 and Bankruptcy Rule 9027, the Court therefore reports to the District Court that the proceeding sought to be removed is one which can and should be removed to this Court.

4. This Court therefore reports and recommends to the District Court that:

(a) The petition for removal be granted; and

(b) The motion for remand be denied.

5. The Court will reserve ruling on the pending motions to dismiss and for sanctions pending the District

Court's ruling on this Court's report on the motion for remand.

SO ORDERED in Chambers at Miami, Florida, this 22 day of December, 1987.

/s/ Sidney M. Weaver
United States Bankruptcy
Judge

cc: Counsel of Record per
attached Service List

(Service to be Effected by Mr. Salter)

APPENDIX H

EXHIBIT C

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 87-44662

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN, ASSOCIATES, HOLYWELL CORPORATION, Plaintiffs	COMPLAINT AND REQUEST FOR JURY TRIAL
v.	
THE BANK OF NEW YORK, CITY NATIONAL BANK OF MIAMI, as Trustee under Land Trust # 5008793, M. C. HOLDING PARTNERS, a New York general Partnership, and its General Partners, namely, ROBANK CORP., H.D. LIQUIDATION INC., ZENTAC INVESTMENTS INC., BOTT FLORIDA HOLDING CORP., AMERICAN SECURITY LTD., and M CENTER CORPORATION and FRED STANTON SMITH, individually and as Trustee of MIAMI CENTER LIQUIDATING TRUST, Defendants.	(Filed Oct. 15, 1987)

This is an action for breach of fiduciary duty and a common law action for damages and other relief against both fiduciary and third party Defendant, arising from the actions of Defendants in Dade County Florida, and Plaintiffs seek an award of damages, exclusive of costs and interest, in excess of $5,000. Plaintiffs MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, and CHOPIN ASSOCIATES have their principal place of business in Dade County, Florida, and all of the Defendants are presently engaged in business in Dade County, Florida.

Plaintiffs MIAMI CENTER LIMITED PARTNERSHIP (MCLP), MIAMI CENTER CORPORATION (MCC), CHOPIN ASSOCIATES (CHOPIN), and HOLYWELL CORPORATION (HOLYWELL), through counsel, and Plaintiff THEODORE B. GOULD (GOULD), *pro se*, sue Defendants, THE BANK OF NEW YORK, CITY NATIONAL BANK OF MIAMI, as Trustee under Land Trust # 5008793, M.C. HOLDING PARTNERS, its General Partners, namely, ROBANK CORP., H. D. LIQUIDATIONS, INC., ZENTAC INVESTMENTS, INC., BOTT FLORIDA HOLDING CORP., AMERICAN SECURITY LTD., and M CENTER CORPORATION, and FRED STANTON SMITH, individually and as Trustee for the Miami Center Liquidating Trust, and state as follows:

1. Plaintiffs MIAMI CENTER LIMITED PARTNERSHIP (hereinafter referred to as "MCLP"), a partnership formed in 1979 in accordance with the Limited Partnership Act of the State of Florida, consisting of forty (40) unites of limited partnerships interests, is owned by twenty-five (25) individuals or entities, of which the MIAMI CENTER CORPORATION (hereinafter referred to

as "MCC"), incorporated in the State of Florida in 1979, and Plaintiff THEODORE B. GOULD (hereinafter referred to as "GOULD") individually, are the general partners. MCLP entered into a 99-year ground lease with Plaintiff CHOPIN ASSOCIATES (hereinafter referred to as "CHOPIN") in 1979 for the purpose of developing and operating the Edward Ball Office Building, Pavillon Hotel, retail space, and a parking garage on the leased land in Miami, Florida. GOULD and Plaintiff HOLYWELL CORPORATION (hereinafter referred to as "HOLYWELL"), incorporated in the State of Delaware in 1976, are limited partners of MCLP. MCC is a wholly-owned subsidiary of HOLYWELL. Plaintiff GOULD is the sole stockholder of HOLYWELL, and a citizen and resident of Albemarle County, Virginia.

2. Defendant BANK OF NEW YORK (hereinafter sometimes referred to as "the BANK") is a New York banking corporation.

3. Defendant CITY NATIONAL BANK of MIAMI is a national banking corporation doing business in Florida.

4. Defendant M. C. HOLDING PARTNERS is a New York general partnership whose partners are Defendants ROBANK CORPORATION, H. D. LIQUIDATIONS, INC., ZENTAC INVESTMENTS, INC., BOTT FLORIDA HOLDING CORP., AMERICAN SECURITY LTD., and M CENTER CORPORATION. None of these six corporations is presently qualified to do business in Florida.

5. Defendants ROBANK CORPORATION, H. D. LIQUIDATIONS, INC., ZENTAC INVESTMENTS, INC.,

BOTT FLORIDA HOLDING CORP., AMERICAN SECURITY LTD., and M CENTER CORPORATION are, respectively, the subsidiaries or affiliates of: Defendant BANK OF NEW YORK (ROBANK), IRVING TRUST COMPANY (H. D. LIQUIDATIONS, INC.), SECURITY PACIFIC BANK (ZENTAC INVESTMENTS, INC.), BANK OF TOKYO (BOTT FLORIDA HOLDING), AMERICAN SECURITY BANK (AMERICAN SECURITY), and in INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (M CENTER CORPORATION).

6. Defendant FRED STANTON SMITH (hereinafter referred to as TRUSTEE) is a citizen and resident of Dade County, Florida.

7. Defendant BANK, in its own right, and as agent for other financial institutions, including AMERICAN SECURITY BANK, BANK OF TOKYO, IRVING TRUST COMPANY, SECURITY PACIFIC BANK, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, provided the interim loans for purchase of the land and construction of the leasehold improvements. All evidences of indebtedness with respect to this project were made payable solely to BANK OF NEW YORK.

8. On or about July 24, 1984, Defendant BANK, having previously declared its loans in default on the Miami Center Project, instituted foreclosure proceedings against the Project in the Dade County Circuit Court, Miami, Florida.

9. On August 22, 1984, Plaintiffs MCLP, MCC, CHOPIN, HOLYWELL, and GOULD filed their separate petitions for reorganization under Chapter 11 of the

Bankruptcy Reform Act of 1978 in the United States Bankruptcy Court for the Southern District of Florida.

10. On February 26, 1985, Defendant BANK filed its proposed consolidated Plan of Reorganization (thereafter amended) (hereinafter referred to as "the BANKS PLAN"), in the above-referenced Chapter 11 proceedings, offering to purchase the land, leasehold improvements, and certain chattels for a purchase price of $255.6 million. A true and correct copy of the Plan of Reorganization, as later amended, is attached hereto as Exhibit 1.

11. On August 8, 1985, the United States Bankruptcy Court for the Southern District of Florida entered a Confirmation Order, confirming the BANK'S PLAN, as amended, and concluding that "The Bank of New York was undersecured." In accordance with 11 U.S.C. Section 1141, MCLP, MCC, GOULD, HOLYWELL, and CHOPIN were discharged as Debtors and their Chapter 11 estates were closed by operation of law. The effect of this confirmation and discharge was to limit the retention of the Bankruptcy Court's jurisdiction in accordance with 11 U.S.C. Section 1101, and Article XIV of the BANK'S PLAN, and the discharged Debtors were not thereafter personally subject to the bankruptcy Court's jurisdiction jointly or individually, a true and correct copy of the Confirmation Order of August 8, 1985, is attached hereto as Exhibit 2.

12. The BANK'S PLAN called for the creation of a trust, to be known as the MIAMI CENTER LIQUIDATING TRUST (hereinafter referred to as "the TRUST"), and the appointment of a Trustee to be selected by the Bankruptcy Court to administer the TRUST.

13. The BANK'S PLAN provided that the Trustee was to administer the TRUST as a fiduciary on behalf of the Plaintiffs herein, but subject to the right of Defendant BANK to terminate the Trustee's appointment at any time and to appoint a new Trustee. Specifically, Article V., paragraph 3(x), of the PLAN requires that the Trustee deal with the property of the estates in a lawful manner as a fiduciary, and Article V., paragraph 3(x), prohibits the Trustee from taking any action that would change the businesses of any of the Plaintiffs herein, as these businesses existed at or prior to the filing of the Chapter 11 petitions, with the exception that the Trustee was to sell the land, leasehold improvements, and certain chattels, as set forth more fully below.

14. Under the terms of the BANK'S PLAN, the Trustee was to convey title to the land, leasehold improvements, and certain chattels to the BANK or its nominee, and the net sale proceeds were to be paid to the TRUST, to be deposited in the TRUST's bank account, and distributed for the satisfaction of allowed claims of creditors, in accordance with their proper legal priorities, with any residual funds being vested in the Plaintiffs herein, as the named residual beneficiaries of the TRUST.

15. Defendant FRED STANTON SMITH's appointment as Trustee of the TRUST was approved by the Bankruptcy Court on August 12, 1985. A true and correct copy of the Order Appointing The Trustee is attached hereto as Exhibit 3.

16. On October 10, 1985, the BANK executed an Amended Contract of Sale and entered into a closing with its agent, Defendant TRUSTEE, who was purportedly

acting as a fiduciary for the Plaintiffs, pursuant to which the Defendant TRUSTEE conveyed title on behalf of the TRUST of the land, leasehold improvements, and certain chattels owned by the Plaintiffs to the BANK's designee, Defendant CITY NATIONAL BANK OF MIAMI as trustee under Land Trust # 5008793, for which the beneficiary is Defendant M. C. HOLDING PARTNERS.

17. Closing adjustments related to the conveyance were to be consummated within 45 days after the execution of the Amended Contract of Sale on October 10, 1985, pursuant to a Closing Letter regarding adjustments and prorations between the BANK and the TRUST, dated October 10, 1985, but were delayed by Defendant BANK and have not been completed despite the fact that two years have elapsed. A true and correct copy of the Closing Letter is attached and made a part hereof as Exhibit 4.

18. As of September 30, 1987, the amount of the sale proceeds and accrued interest owed to the TRUST and not paid by Defendant BANK is at least $39,533,559.67.

19. Pursuant to the terms of the Amended Contract of Sale, and to his fiduciary responsibilities as Trustee of the Miami Center Liquidating Trust, the Defendant TRUSTEE Smith was obligated to assert the rights of the TRUST to the cash proceeds due to be paid by the BANK's designee to the MIAMI CENTER LIQUIDATING TRUST, in consummation of the closing adjustments, and to thereby preserve and protect the assets of the MIAMI CENTER LIQUIDATING TRUST on behalf of the creditors and equity security holders, and on behalf of the Plaintiffs as residual beneficiaries of the MIAMI CENTER LIQUIDATING TRUST.

20. At the closing on October 10, 1985, Defendant BANK, as Buyer, drafted the Closing Statement, knowingly and wrongfully taking improper credits against the TRUST, as Seller, and inducing Defendant TRUSTEE Smith into knowingly and wrongfully acquiescing in Defendant Bank's wrongful actions or because of a mutual misunderstanding of fact by both parties; Defendant TRUSTEE Smith, acting in his conflicting capacities as both coerced agent of Defendant BANK and as Trustee of the TRUST, knowingly and wrongfully breached his fiduciary duties to the beneficiaries of the TRUST by acquiescing in Defendant BANK's wrongful actions, thereby failing to preserve and conserve the assets of the TRUST and in fact affirmatively dissipating said assets. The action of Defendant BANK and Defendant TRUSTEE Smith resulted in substantial damages to the beneficiaries of the TRUST, for which Defendants are jointly and severally liable to the Plaintiffs for an amount in excess of $39,533,559.67.

21. As of September 30, 1987, two years after the conveyance of title pursuant to the Amended Contract of Sale to the BANK's nominee, the Defendant TRUSTEE Smith has still failed, despite repeated demands by the Plaintiffs herein, to make any demand upon the BANK for the consummation of the closing adjustments contemplated by the Amended Contract of Sale and Closing Letter of October 10, 1985, and Defendant BANK has failed to tender to the TRUSTEE the funds due the TRUST. True and correct copies of two of Plaintiffs' letters demanding that Defendant TRUSTEE take action to remedy this situation are attached hereto as Exhibits 5 and 6.

22. By failing to take any action whatsoever to effecutate the consummation of the closing adjustments for two years after the conveyance of title pursuant to the Amended Contract of Sale, despite the repeated demands by the Plaintiffs herein, Defendant TRUSTEE Smith has negligently, willfully, and intentionally breached his fiduciary responsibility to the Plaintiffs herein – the residual beneficiaries of the TRUST, in that he has failed to take any action against the BANK and its affiliates to conserve and preserve the assets of the TRUST.

23. Defendant TRUSTEE's continuing breach of his fiduciary duties to the TRUST, and Defendants BANK'S knowing and wrongful assertion of improper closing credits and its failure to conclude and pay the established closing adjustments, has resulted, and will continue to result in the dissipation of the assets of the TRUST, whereby Plaintiffs herein – the residual beneficiaries of the TRUST – have been damaged in an amount in excess of $39,533,559.67, and will continue to sustain such damages or more as long as Defendants fail to take any action to resolve these issues.

24. Specifically, the Defendant TRUSTEE has failed, for two years, to take any action to assert against the BANK, its titleholder, CITY NATIONAL BANK OF MIAMI, as Trustee under Land Trust # 5008793, or its nominee, M. C. HOLDING PARTNERS, as beneficial transferee of the land, leasehold improvements, and certain chattels, for which title was conveyed pursuant to the Amended contract of Sale the following claims:

(a) The MIAMI CENTER LIMITED PARTNERSHIP is entitled to a credit of $1,139,015.00, representing

funds which were disbursed after the contract price was determined for the completion of the construction of the leasehold improvements. These funds were advanced to the MIAMI CENTER LIMITED PARTNERSHIP pursuant to the authorization of the Bankruptcy Court and inured to the benefit of the BANK and its affiliates for which the MIAMI CENTER LIMITED PARTNERSHIP is entitled to a closing adjustment credit of $1,139,015.00.

(b) At the closing on October 10, 1985, the BANK improperly claimed a credit toward the purchase price of the Miami Center Project in the amount of $27,050,115.02, representing the BANK's calculation of the amount of the post-petition interest, despite the fact that the Bankruptcy Court had found, in its Confirmation Order, that the Bank of New York was an undersecured creditor. By operation of the Bankruptcy Code, under these conditions, the BANK was not entitled to a credit for post-petition interest. The BANK knowingly and wrongfully claimed the credit on behalf of itself and its affiliates, and the TRUSTEE improperly allowed the BANK and its affiliates to take the post-petition interest credit, and has failed, despite repeated demands by the Plaintiffs herein, to assert any claim against the BANK for repayment to the TRUST of the post-petition interest.

(c) The TRUST is entitled to a closing adjustment in the amount of $2,168,783.82 as a result of the BANK claiming credit for 1985 real estate taxes in the amount of $4,291,625.46, whereas the amount of such taxes actually paid by the BANK was only $2,122,841.64.

(d) The TRUST is also entitled to a closing adjustment in the amount of $1,305,529.00, representing

the excess of the cost of stored construction materials received by the BANK's designee over the tentative allowance made by the BANK of $550,000.00.

(e) Finally, the TRUST is entitled to a variety of other smaller closing adjustments in the net amount of $207,030.47, representing twenty-eight (28) items not provided for in the original tentative calculations or else provided for on the basis of estimates which were later corrected to reflect actual figures.

The total of the foregoing items that the TRUST is due and has not received (since the TRUSTEE has never seen fit to demand settlement for these items from the Buyer) is $31,570,473.31. Interest on this amount at the legal rate from the date of the conveyance to September 30, 1987, amounts to $7,663,086.36, making the total due the TRUST at that date $39,533,559.67, of which amount your Plaintiffs, as residuary beneficiaries of that TRUST, continue to be deprived. A corrected closing statement listing all of the individual items of adjustment is attached hereto as Exhibit 7.

25. In addition to failing to make demand on the BANK during the period of two years, for the above-referenced sums properly due the TRUST, in payment pursuant to the Amended Contract of Sale, the Defendant TRUSTEE has further breached his fiduciary duty to the Plaintiffs herein, as residual beneficiaries of the TRUST, in the following other respects:

(a) The Defendant TRUSTEE has commingled the funds and not provided a proper accounting segregating the various Plaintiffs' assets and liabilities.

(b) In spite of having received the gross proceeds from the sale of the "Washington properties" where the order only called for the Defendant TRUSTEE to receive the net proceeds, the TRUSTEE has failed to establish any reserve for the payment of unpaid income taxes accruing from the sale of these properties, the apparent amount of which is in excess of $15.9 million.

(c) The TRUSTEE has failed to repay from the assets of the TRUST the claim for the super-priority loans owed to Plaintiffs GOULD and HOLYWELL in the amount of $5,758,790.51 (representing principal and interest through June 30, 1987), plus interest from July 1, 1987.

(d) The TRUSTEE has failed to pay administrative expenses of the proceeding owed to affiliated creditors, including administrative rent, in the amount of $4,741,736.32.

(e) The TRUSTEE has failed to pay the claim of Miami Center Joint Venture (*not* an affiliated creditor but rather a third party) for rent and late charges under the A and B Leases in the amount of $7,338,152.00.

(f) The Trustee has failed to pay the Class 5 prepetition claims of the affiliated creditors in the amount of $10,612,245.00.

(g) The TRUSTEE has failed to pay Plaintiff CHOPIN the ground rent due it in the amount of $5.3 million, a portion of which is administrative rent, which amount, under the terms of the contractual documents, had a priority superior to the BANK's mortgages.

(h) The Defendant TRUSTEE has acquiesced in the request of the Internal Revenue Service (IRS) that the

IRS be allowed to reinstate its tax claim against HOLYWELL CORPORATION, after the United States District Court for the Southern District of Florida, Davis J., had dismissed the IRS appeal as a result of the IRS' failure to timely file its Brief as Appellant. The appeal was dismissed on August 14, 1987, but Defendant TRUSTEE, contrary to his fiduciary duty, promptly entered into a stipulation agreement which resulted in the case being reopened on September 1, 1987.

(i) The TRUSTEE has acquiesced in the action of Defendant BANK in requiring the escrowing of over $7 million of funds belonging to MIAMI CENTER LIMITED PARTNERSHIP for disputed Dade County real estate taxes, when Dade County is not eligible to receive any such amount because of its failure to file any proof of claim or application for administrative expenses in the bankruptcy proceedings. Further, the TRUSTEE has failed to institute an action against Dade County in the Bankruptcy Court to confirm that Dade County has no claim for these real estate taxes, in spite of the request of all interested parties that he do so.

(j) The TRUSTEE has also failed to institute suit against Defendant BANK to establish its liability as "employer-in-fact" under I.R.C. Sections 3505 and 6323 for the payment of the penalty and interest related to the employment payroll taxes of MCLP and to require it to rebate to the TRUST the amount of $2,120,021.67, representing payroll taxes paid by the TRUST which were the liability of the BANK during the period in which it controlled all disbursements of MCLP's funds.

26. The total balance due from the BANK and its affiliates to the Seller MIAMI CENTER LIQUIDATING TRUST at closing on October 10, 1985, was $31,870,473.31; interest on this amount at the legal rate represents a total of $7,663,086.36 as of September 30, 1987; the interest accruing after September 30, 1987, is at the rate of $10,623.49 per day.

COUNT I

NEGLIGENCE BY SMITH

27. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 26 above.

28. By virtue of the foregoing, Defendant Smith has acted negligently in the discharge of his duties as TRUSTEE of the TRUST.

29. As a result of Smith's negligence, Plaintiffs have suffered damages in the amount of at least $39,533,559.67, plus interest.

COUNT II

BREACH OF FIDUCIARY DUTY BY DEFENDANT SMITH

30. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 26 above.

31. By virtue of the foregoing, Defendant Smith has willfuly breached his fiduciary duty to administer the TRUST on behalf of the Plaintiffs herein.

32. In breaching his fiduciary duty to the Plaintiffs, Smith has acted intentionally or negligently in reckless disregard of the Plaintiffs' rights and interests.

33. Smith's breach has damaged the Plaintiffs in the amount of at least $39,533,559.67, plus interest.

COUNT III

EQUITABLE RELIEF AGAINST DEFENDANT SMITH

34. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 33 above.

35. As a result of Smith's negligence and his intentional or negligent failure to discharge his fiduciary duties to the Plaintiffs herein and to other, Smith should be removed as TRUSTEE of the TRUST.

COUNT IV

BREACH OF CONTRACT

36. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 26 above.

37. The BANK'S PLAN imposed obligations upon the Defendants herein to act fairly and to engage in a good faith effort to fully comply with the terms of the plan for the benefit of all parties in interest in the bankruptcy proceedings, including the Plaintiffs herein.

38. By virtue of the foregoing actions, the Defendants have willfully and intentionally breached their obligations, including an implied duty of good faith and fair dealing.

39. Plaintiffs have been damaged by Defendants' breach in the amount of at least $39,533,559.67, plus interest.

COUNT V

CONVERSION BY THE BANK OF NEW YORK

40. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 26 above.

41. The TRUSTEE has the immediate right to possession of the monies owed to the TRUST upon effectuation of the closing adjustments required under the Amended Contract of Sale.

42. The failure and refusal of the Bank of New York to turn over possession of the monies it wrongfully has retained after the conveyance of title constitutes a conversion of these funds.

43. As residual beneficiaries of the TRUST, Plaintiffs have been and continue to be damaged by the Bank of New York's wrongful conversion of these funds.

44. The Bank of New York's actions have been intentional, willful and in utter disregard of the rights of Plaintiffs herein.

45. Plaintiffs have suffered damages as a result of the bank of New York's conversion in the amount of at least $39,533,559.67, plus interest and are further entitled to punitive damages as a result of Defendant's willful and intentional misconduct.

WHEREFORE, Plaintiffs request as follows:

(a) That judgment be entered in their favor against the Defendants herein, jointly and severally, in the amount of an least $39,533,559.67, plus interest from September 30, 1987.

(b) That judgment be entered in their favor for the amount of damages which they have sustained by reason of the acts and omissions set forth in paragraph 25 above, as established by the jury.

(c) That punitive damages in the amount of $100,000,000.00 be awarded Plaintiffs against Defendants, jointly and severally.

(d) That Defendant FRED STANTON SMITH be removed as TRUSTEE of the TRUST for his willful and negligent failure to discharge his fiduciary responsibilities to the Plaintiffs herein and to others.

(e) For a trial by jury of all issues of fact asserted herein.

Respectfully submitted,

MIAMI CENTER LIMITED PARTNERSHIP,
HOLYWELL CORPORATION,
CHOPIN ASSOCIATES,
AND MIAMI CENTER CORPORATION

This 15th day of October, 1987

By: /s/ Robert A. Mark
Robert A. Mark
Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 789-3440

By: /s/ Robert M. Musselman
Robert M. Musselman
413 Seventh Street, N.E.
(P. O. Box 254)
Charlottesville, Virginia
22902
(804) 977-4500

THEODORE B. GOULD

By: /s/ Theodore B. Gould
Theodore B. Gould, *pro se*
2564-B Ivy Road
Charlottesville, Virginia
22901
(804) 293-7125

APPENDIX I

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

ORDER APPOINTING TRUSTEE

On August 8, 1985 the Court entered an order confirming the Amended Consolidated Plan of Reorganization proposed by the Bank of New York (the "Bank's Plan"). Article V of the Plan contemplates the establishment of a liquidating trust and the appointment of a Trustee for all property of the debtors.

The Bank of New York has nominated Fred Stanton Smith to serve as trustee under the Bank's Plan. In accordance with the discussions among counsel in open Court on August 8, Mr. Smith has been introduced to counsel for the debtors and Olympia & York.

In the interest of assuring an orderly transition from the debtors-in-possession to the Trustee, it is hereby ORDERED that:

1, Fred Stanton Smith is hereby appointed as Trustee for purposes of the Bank's Plan.

2. Since motions for rehearing are anticipated and will not be heard until next month, for the time being:

(a) the Trustee's compensation and expenses shall be borne by the Bank;

(b) The Trustee shall not assume title to, and possession and control of the debtors' property and affairs as contemplated by the Bank's Plan until such time, if any, as the motions for rehearing on the confirmation order have been heard and determined; in the interim, the Trustee and his representatives shall have the power and right:

(1) Upon notice to the debtors-in-possession, to enter upon and inspect the debtors' premises in order to become familiar with debtors' operations, including, without limitation, the Miami Center buildings and operations;

(2) Review and copy all books and records of the debtors and their respective subsidiaries, including all records, relating to receipts and disbursements, all bank statements, checkbooks, ledgers, and other financial data;

(3) Discuss the affairs and business operations of the debtors and their respective subsidiaries with the officers, directors, employees, attorneys, accountants, agents, tenants, subtenants, of such entities in order to gain a thorough understanding of such affairs and operations; and

(4) Engage attorneys, accountants, and such further consultants as he may deem appropriate, providing notice of such retention to parties in interest, for the

purpose of analyzing the legal rights and financial position of the debtors and their respective subsidiaries.

3. On or before the date the Trustee assumes possession and control of the debtor's property and affairs pursuant to the Plan, the Trustee shall:

(a) File with the Court and serve upon all parties in interest a written statement describing the proposed basis for his compensation as Trustee and the identity of, and proposed compensation for, such attorneys, accountants, and consultants as have been retained by him. No compensation shall be payable to the Trustee or to any such attorney, accountant, or consultant from the assets of the debtors' estates until the Court has reviewed and heard any objections to such proposed compensation arrangements.

(b) Post a Trustee's bond in the amount of $1,000,000.00 in form approved by the Court. All payments of claims by the Trustee shall be approved by Court order.

DONE AND ORDERED at Miami, Florida, this 12 day of August, 1985.

/s/ Thomas C. Britton
Bankruptcy Judge

cc: Counsel and Parties per
Attached Service List

APPENDIX J

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtor(s).

CONFIRMATION ORDER

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical plans. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Although conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B.R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better.

The bank's plan rests upon a firm commitment by the bank to purchase the property for $255.6 million. The debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtor's debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

	Debtors' Plans	BONY Plan
Holywell	97% Rejection	15% Rejection
MCLP	80% "	10% "
MC Corp.	99% "	10% "
Chopin	99% "	0.1% "
Gould	80% "	12% "

Each of the creditor's committees have elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in an adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C. P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of $14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order, I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures

the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtor's major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetition here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29.

(C. P. No. 614). There was an addendum to that stipulation on the same day. (C. P. No. 564). A second addendum was agreed upon on May 30 (C. P. No. 709(c)), and a third addendum was agreed upon on July 30. (C. P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129(b) (1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtor's plans.

DONE and ORDERED at Miami, Florida, this 8th day of August, 1985.

/s/ Thomas C. Britton
Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esquire
John Kozyak, Esquire
Scott D. Sheftall, Esquire
Irving Wolff, Esquire
Thomas F. Noone, Esquire
Joel Aresty, Esquire
All Committees
Vance Salter, Esquire
All creditors

APPENDIX K

V. *CREATION OF TRUST*

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of § 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

2. On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however*, to all existing liens, mortgages, security interests and encumbrances.

3. Subject to the provisions of this Plan and in order to insure the prompt implementation of the Plan, the Trustee shall have full power and authority to:

(a) Enter into the Contract of Sale and to perform all acts that are necessary or appropriate to effect the sale of Miami Center to BNY or its designee in accordance with the Contract of Sale;

(b) Perfect and secure his right, title and interest to the Trust Property;

(c) Reduce all of the Trust Property to his possession and hold the same;

(d) Sell and convert the Trust Property to cash and distribute the proceeds as specified herein;

(e) Manage, operate, improve, and protect the Trust Property as specified herein;

(f) Lease or renew leases;

(g) Grant options to purchase and to contract to sell and sell the property owned by the Trust or any part or parts thereof for such purchase price and for cash or on such terms as may be appropriate;

(h) Mortgage, pledge or otherwise encumber the Trust Property or any part or parts thereof;

(i) Exchange and re-exchange the Trust Property or any part or parts thereof for other real or personal property;

(j) Release, covey or assign any right, title or interest in or about the Trust Property;

(k) Pay and discharge any mortgage or other lien or encumbrance against the Trust Property and pay and discharge any other costs, expenses or obligations deemed necessary to preserve the Trust Property or any part thereof or the preserve the Trust;

(l) Improve or repair the Trust Property or any part thereof;

(m) Purchase insurance of all kinds sufficient to protect fully the Trust Property and to protect from liability the Trustee, the Creditors Committees and the employee of any member of the Creditors Committees;

(n) Deposit trust funds and draw checks and make disbursements thereof;

(o) Employ attorneys, accountants, engineers, agents, realtors, rental agents, tax specialists and clerical and stenographic assistants as may be deemed necessary, at such compensation as the Trustee may deem reasonable;

(p) Take any action required or permitted by this plan;

(q) Sue and be sued;

(r) Appoint, remove and act through agents, managers and employees and confer upon them such power and authority as may be necessary or advisable;

(s) Invest funds of the Trust in demand and time deposits in any national bank which is an authorized depository for bankruptcy funds in the federal district in which the Trustee resides or to make temporary investments such as short-term certificates of deposit in such bank or treasury bills;

(t) Prosecute and defend all actions affecting the Trust Property;

(u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them, including but not

limited to the discontinuances required by the Contract of Sale;

(v) Waive or release rights of any kind relating to the Trust Property or the Debtors or any of them, including but not limited to the releases required by the Contract of Sale;

(w) Deal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any person owning the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter.

(x) Take no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions.

4. In no case shall any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, or to any part or parts thereof, be obligated to see that the provisions of this Plan or the terms of the Trust have been complied with, or be obligated or privileged to inquire into the authority of the Trustee to act, or to inquire into any other limitation or restriction of the power and authority of the Trustee, but as to any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, the power of the Trustee to act or otherwise deal with said properties shall be absolute.

5. The Trustee shall receive reasonable compensation for his services subject to the approval of the Court which fee shall be a charge against and paid out of the Trust Property.

6. All costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property, and the Court, upon being satisfied as to the correctness of any and all such costs, expenses and obligations, shall approve and direct the payment thereof prior to a distribution to the holders of unsecured Allowed Claims.

7. No recourse shall ever be had, directly or indirectly, against the Trustee or any of his agents or employees personally by legal or equitable proceedings or by virtue of any statute or otherwise, it being expressly understood and agreed that all liabilities of the Trustee or such agents are employees or under this Trust shall be enforceable only against and be satisfied only out of the Trust Property.

8. The Trustee shall not be liable for any act or failure to act in his capacity as trustee hereunder while acting in good faith and in the exercise of his best judgment, nor shall the Trustee be liable in any event except for his own gross negligence, willful default or misconduct.

9. The Trustee may resign at any time by giving written notice of his intention to do so addressed to the Court, and such resignation shall be effective upon the date provided in such notice.

10. In case of the resignation of the Trustee, a successor shall thereupon be appointed by an instrument in writing, signed and acknowledged (i) prior to the acquisition of Miami Center by BNY, by BNY and the Creditors' Committee and (ii) subsequent to the acquisition of

Miami Center, by the Creditors Committees and delivered to the resigning Trustee, whereupon such resigning Trustee shall convey, transfer and set over to such successor in trust by appropriate instrument or instruments all of the Trust Property then in his possession and held hereunder. Said successor shall thereupon be vested with all the rights, privileges, powers and duties of the Trustee named herein. Each succeeding Trustee may in like manner resign, and another may in like manner be appointed in his place.

11. If BNY or the Creditors Committees at any time desire to terminate the rights of the Trustee then acting under the Trust and appoint a new Trustee in his stead, BNY and the Creditors Committees may do so by a written instrument, addressed to such Trustee then acting; thereupon like conveyances as in the case of resignation of the Trustee shall be made by the Trustee then acting to the newly appointed Trustee, and such new Trustee shall be vested with all the rights, privileges, powers and duties of the Trustee herein named.

APPENDIX L

IV. *MEANS FOR EXECUTION OF THE PLAN*

Sale of Miami Center

The plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date.

(ii) pay (if requested by BNY, under protest) from such cash the Personal Property Taxes for 1983 and 1984, and pay the Debtor's pro rata portion of the personal property taxes for 1985 due to the Miami Center Closing Date.

(iii) take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase

option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center, except those set forth on Exhibit B attached hereto, and except as provided in Article XI hereof. At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result of the merger of such leases effected by the substantive consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP the FF&E covered by such Leases) and would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase option on the Miami Center Closing Date. On the Effective Date all other liens and encumbrances, including the mechanics liens and judgment liens on Miami Center are transferred and shall attach to the Trust Property, including the Washington Proceeds, subject to the security interests of BNY securing the BNY Holywell Loan. All contracts affecting Miami Center that are not to be assumed will be rejected in accordance with Article XI hereof. Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors.

BNY may elect to retain its mortgages on and security interests in Miami Center after the passing of title;

however, upon the passing of title, the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released.

APPENDIX M

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 86-5286, 86-5386

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES, and HOLYWELL CORPORATION,

Plaintiffs-Appellants,

v.

BANK OF NEW YORK,

Defendant-Appellee,

MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,

Plaintiffs-Appellants,

v.

THE BANK OF NEW YORK, *et al.*,

Defendants-Appellees.

Appeals from the United States
District Court for the Southern District of Florida

June 29, 1987

OPINION OF THE COURT

Before GODBOLD and ANDERSON, Circuit Judges, and SWYGERT*, Senior Circuit Judge.

GODBOLD, Circuit Judge:

These consolidated appeals are before us on two separate but related district court decisions: (1) affirmance of the bankruptcy court's confirmation of a proposed reorganization plan (No. 86-5286); and (2) dismissal of a separate action against the Bank of New York (No. 86-5386). We dismiss these appeals as moot.

BACKGROUND

Appellants are the five debtors in the underlying Chapter 11 proceeding: Theodore Gould; Holywell Corporation (Gould is sole stockholder and president); Miami Center Corporation (wholly-owned subsidiary of Holywell with Gould as president); Chopin Associates (general partnership between Gould and Miami Center Corporation); and Miami Center Limited Partnership (Gould and Miami Center Corporation are general partners and owners of some limited partnership shares). These debtors developed the Miami Center Project, which consisted of an office building, a hotel, retail space and a garage in downtown Miami. The Bank of New York financed the construction of the Project.

Debtors filed voluntary petitions for bankruptcy when the Bank instituted foreclosure proceedings against

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*Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

the Project. The filing of the petitions automatically stayed all actions against debtors, including the Bank's foreclosure action. Over 400 creditors have or had an interest in the bankruptcy proceeding.

Both debtors and the Bank filed competing reorganization plans in the bankruptcy proceeding.[1] The creditor committees and individual creditors overwhelmingly approved the Bank's plan and rejected debtors' plan. The bankruptcy court subsequently confirmed the Bank's plan, over debtors' and debtor-affiliated entities' objections.[2]

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[1] Although the five debtors submitted individual plans, the plans were virtually identical.

[2] The central features of the reorganization plan were:

(1) substantive consolidation of the estates of the five debtors;

(2) creation of the Miami Center Liquidating Trust, consisting of all assets of debtors, for the payment of creditor claims by a court-appointed liquidating trustee;

(3) purchase by the Bank or its designee of the project (including furniture, fixtures and equipment) for the appraised value of $255.6 million, which was to be funded by net amount owned to the Bank by debtors (approximately $240 million) plus new cash by the purchaser;

(4) release by the Bank of its cash collateral (approximately $30 million), which would be added to the new trust;

(5) further financing commitment of approximately $15 million by the Bank for payment of the claim of Miami Center Joint Venture (which is a general partnership between Gould

(Continued on following page)

Debtors sought to stay the implementation of the reorganization plan pending an appeal to the district court. The bankruptcy court conditioned such a stay on the posting of a $140 million bond, later reduced by the district court to $50 million. We dismissed an interlocutory appeal of this bond requirement for lack of jurisdiction. Debtors failed to post the bond within the required time limit, and the trustee began implementing the reorganization plan, including the sale of the Miami Center Project to the Bank's designee for $255.6 million.

Debtors appealed the bankruptcy court's confirmation of the reorganization plan. District Judge Aronovitz of S.D. Florida denied the Bank's motion to dismiss the appeal and remanded the case to the bankruptcy court for entry of explicit findings of fact and conclusions of law upon which the district court could properly base its appellate review. On remand the bankruptcy court held an evidentiary hearing and solicited proposed findings of

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and Olympia & York Corporation) for the furniture, fixture and equipment leased by the joint venture to the project (a) if and when such claim is allowed over the Bank's pending objections now on appeal in a separate action; (b) to the extent that other assets of the trust prove insufficient to pay the claim; and (c) only if it is ultimately determined that the joint venture has been damaged by its allegedly improper classification under the reorganization plan;

(6) classification of the claimants so that unaffiliated creditors of Holywell are paid first, unaffiliated creditors of other debtors paid next, and inter-debtor and related party claim paid last; and

(7) dismissal by the trustee of the pending related lawsuit by debtors against the Bank.

fact and conclusions of law from each party. The bankruptcy court adopted the Bank's proposed findings and again confirmed the Bank's proposed reorganization plan. On appeal Judge Aronovitz affirmed the bankruptcy court's confirmation order. 59 B.R. 340.

Debtors also filed a separate action in district court against the Bank, alleging fraud, RICO violations, and other claims in connection with construction loans made by the Bank for the Miami Center Project. District Judge Hoeveler of S.D. Florida dismissed this related action primarily because the reorganization plan, which was confirmed by Judge Aronovitz, instructed the trustees to dismiss the action. Debtors now appeal both Judge Aronovitz's conformation of the reorganization plan (No. 86-5286) and Judge Hoeveler's dismissal of debtors' related action against the Bank (No. 86-5386).[3]

DISCUSSION

The Bank's motion to dismiss these appeals was carried with the case. The Bank contends that the appeals are

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[3] Debtors object to the reorganization plan on several grounds: substantive consolidation of the debtors' estates was clearly erroneous; subordination of the claims of debtor-affiliated entities was clearly erroneous; and modification and amendment of the reorganization plan was improper where the Bank failed to issue a disclosure statement regarding the proposed changes and the bankruptcy court failed to require a hearing on the proposed changes. Debtors also contend that the district court erred is dismissing their related action against the Bank. The Bank makes two motions, which were carried with the case; a motion to dismiss the appeals as moot and a motion to strike debtors' reply brief.

moot because the reorganization plan has been substantially consummated. It relies primarily on our decisions in *In re Matos*, 790 F.2d 864 (11th Cir.1986) and *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984). We explained in *In re Matos* that "when the debtor fails to obtain a stay pending appeal of the bankruptcy court's or the district court's order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal." 790 F.2d at 865; *see also In re Sewanee Land*, 735 F.2d at 1295-96.

The rationale in these cases for dismissing an appeal as moot for failure to obtain a stay pending appeal is that a court cannot order relief without compromising the integrity of the sale of the property to a good faith purchaser. *In re Matos*, 790 F.2d at 866; *Markstein v. Massy Assocs.*, 763 F.2d 1325, 1327 (11th Cir.1985). In this case debtors did not post the bond for the stay, and the project has since been sold to a good faith purchaser. This does not conclude our inquiry, however, because the reorganization plan governed more than just the sale of the project, and an appeal is not moot if the court can still order some effective relief. *See In re Matos*, 790 F.2d at 865 n. 3 (although court could not reverse title if the debtor failed to obtain a stay pending appeal, the appeal was not moot where the debtor could obtain an award of damages from the trustee); *see also In re AOV Indus.*, 792 F.2d 1140, 1146 (D.C.Cir.1986) ("[F]ailure to obtain a stay is not *per se* dispositive of *all* the issues before [the appellate court].").

The proper standard to apply in this case is whether the reorganization plan has been so substantially consummated that effective relief is no longer available. *See In re*

AOV Indus., 792 F.2d a 1147-48 ("Determinations of mootness . . . require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail."); *In re Sun Country Dev., Inc.*, 764 F.2d 406, 407 n. 1 (5th Cir.1985) ("To dismiss [an] appeal on the basis of mootness, we must find that the plan has been so substantially consummated that effective judicial relief is no longer available to [the complaining party].") *In re Information Dialogues, Inc.*, 662 F.2d 475, 476 (8th Cir.1981) (per curiam) (appeal moot when it is "impossible for a court to grant effective relief"); *In re Roberts Farms*, 652 F.2d 793, 797 (9th Cir.1981) (appeal moot when reorganization plan "has been so far implemented that it is impossible to fashion effective relief for all concerned").

Debtors asked Judge Aronovitz to reverse both the bankruptcy court's substantive consolidation of their estates and the court's confirmation of the proposed reorganization plan. They concede on appeal that circumstances have changed since the confirmation order was entered and that complete reversal of the bankruptcy court's orders may no longer be possible. They instead ask for partial reversal and more limited relief. First, they ask us to reverse the bankruptcy court and essentially restructure the reorganization plan so that debtor-affiliated creditors creditors have priority to all remaining funds in the estate. Second, they ask us to reinstate their related lawsuit against the Bank.[4]

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[4] Debtors request the following specific relief:

(1) reverse in par the substantive consolidation order and unconsolidate the estates that are solvent (Holywell and

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The reorganization plan has been substantially consummated.[5] The trustee has conveyed the project, worth

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Gould), close their cases, and let them emerge from bankruptcy with their remaining assets;

(2) reverse in part the confirmation order and restore to their proper status "super priority" loans made by Gould and Holywell to the Miami Center Project so that they have priority over all other creditor claims;

(3) reverse in part the confirmation order and modify the reorganization plan so that leasing claims by debtor-affiliated creditors are restored to the priorities to which they are entitled under the Bankruptcy Code;

(4) reverse in part the confirmation order and vacate the trustee's certificate that entitles the Bank to recover any funds it advances to the joint venture for furniture, fixtures and equipment or modify the reorganization plan so that the Bank's claim for reimbursement is junior to debtor-affiliated claims;

(5) distribute the remaining funds in accordance with the revised classification of the remaining creditor claims; and

(6) reverse Judge Hoeveler's dismissal of debtors' related action against the Bank and reverse in part the confirmation order, thus requiring the trustee to pursue debtors' related action or permitting debtors to pursue the action on their own.

[5] 11 U.S.C. § 1101(2) defines "substantial consummation" for purposes of bankruptcy as follows:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or

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over $250 million, to a good faith purchaser pursuant to the reorganization plan. With the exception of debtor-affiliated creditors, the trustee has paid the undisputed claims of all creditors and reserved funds to pay the disputed claims of the remaining creditors. Effective relief is therefore impossible. *See In re Information Dialogues, Inc.*, 662 F.2d at 476 (effective relief impossible where all undisputed creditor claim have been paid and funds reserved for all disputed creditor claims).

Debtors' reliance on *In re AOV Indus.*, 792 F.2d 1140 (D.C.Cir.1986) is misplaced. In that case substantial funds remained available to compensate the remaining creditors. At the time of the hearing, "only $643,000 of the $3 million made available by the [purchaser's] letter of credit had been drawn down, and none of [the debtor's] $800,000 contribution had been distributed." *Id.* at 1149. Moreover, the court explained that on a motion to dismiss an appeal as moot, a court must consider the proposed relief's "potential impact on the reorganization scheme as a whole," including whether the relief will "implicate or have an adverse effect on the interests of other, non-party creditors." *Id.* at 1148-49.

Unlike the situation in *In re AOV Indus.*, the impact of the proposed relief on the reorganization plan and innocent creditors would be significant. Debtors can obtain

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of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

their requested monetary relief only at the expense of the few remaining unaffiliated creditors whose claims are still in dispute and of the Bank, which has complied with all of its obligations under the reorganization plan. This relief therefore would not be effective judicial relief.

Reinstating the related lawsuit against the Bank and permitting the trustee or debtors to pursue the action would be similarly ineffective relief. Dismissal of the suit against the Bank was an integral part of the reorganization plan, pursuant to which the Bank released $30 million of its cash collateral and extended a further financing commitment of $15 million. Because the Bank has complied with its obligations under the reorganization plan, and because the trustee has paid or reserved funds to pay all creditors other than debtor-affiliated creditors, this court cannot provide effective relief.

Following the submission of these appeals for decision the appellants have moved to supplement the record by filing orders and opinions entered by the Southern District of Florida and the bankruptcy court of the Southern District of Florida, allegedly concerning the matters submitted to this court for decision. The motion is DENIED. This court has, however, treated the motion as though it had been filed under FRAP Rule 28(j) and has considered the opinions and orders attached to the motion as supplemental citations. Having considered these supplemental citations, the court remains of the view that these appeals must be and are DISMISSED.

APPENDIX N

MIAMI CENTER LIMITED PARTNERSHIP, Miami Center Corporation, Theodore B. Gould, Chopin Associates, and Holywell Corporation, Plaintiffs-Appellants,

v.

BANK OF NEW YORK, Defendant-Appellee.

MIAMI CENTER CORPORATION and Chopin Associates, Plaintiffs-Appellants,

v.

BANK OF NEW YORK, et al., Defendants-Appellees.

Nos. 86-5286, 86-5386.

United States Court of Appeals, Eleventh Circuit.

March 10, 1988.

Before ANDERSON, Circuit Judge, SWYGERT* and GODBOLD**, Senior Circuit Judges.

ON PETITION FOR REHEARING AND REHEARING EN BANC BY APPELLANTS AND PETITION FOR REHEARING BY APPELLEES

(Opinion June 29, 1987, 11 Cir., 820 F.2d 376).

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*Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation. Judge Swygert did not participate in the consideration of these petitions. This order is entered by the quorum. See 28 U.S.C. § 46.

**_See_ Rule 34-2, Rules of the U.S. Court of Appeals for the Eleventh Circuit.

GODBOLD, Senior Circuit Judge:

On petition for rehearing by appellants/debtors we entered an order on September 8, 1987, 826 F.2d 1010 (11th Cir. 1987), in which we attempted to correct what we believed was an error in our opinion, 820 F.2d 376 (11th Cir. 1987). In this order we reaffirmed our conclusion that these consolidated appeals should be dismissed and denied appellants' petition for rehearing. Subsequently the appellants/debtors filed a petition for rehearing en banc, and the appellees filed a petition for rehearing with respect to the September 8 order.

It now appears that our correction was wrong. We have, therefore, gone back to square one and have reviewed the record and the numerous briefs. There are two appeals before us. No. 86-5286 is an appeal from an order of the district court entered in an appeal to it affirming two orders of the bankruptcy court. This appeal to us is the primary subject of this opinion. We hold that the district court should have dismissed the appeal to it as moot, and we remand to the district court with instructions that it do so. No. 86-5386, a related case, is an appeal to us from an order of the district court dismissing a civil action for damages brought in the district court by the debtors in No. 86-5286 against the major creditors. Our disposition of this appeal is controlled by out decision in No. 86-5286. In No. 86-5386 we affirm the district court's dismissal.

The appellants are five Chapter 11 debtors – an individual debtor, Theodore B. Gould, and four other debtors owned, controlled, or dominated by Gould. All have been involved in development of the Miami Center project, a

modern thirty-five story hotel and office building structure, joined by a restaurant and shopping complex, plus a parking garage, situated at a bay-front site in downtown Miami, Florida. The Bank of New York financed the construction of the project and is the principal debtor. Its mortgage fell into default, and it began foreclosure. The five debtors filed voluntary petitions for bankruptcy, and the bankruptcy court consolidated the estates. The debtors continued in possession.

The debtors and the bank filed competing reorganization plans. The creditor committees and individual creditors overwhelmingly approved the bank's amended plan and rejected the debtors' plans. The bank's amended plan included a proposal that the estates of the five debtors be consolidated. The bankruptcy court entered two orders that are central to No. 86-5286. On July 23, 1985 it approved substantive consolidation of the debtors' estates and overruled debtor's objections to that aspect of the reorganization plan. The court noted:

> The consolidation of the five estates is for the purpose of allowing all available funds and assets of the estates to be used in accordance with the Bank's Amended Plan, if confirmed, to pay all allowed creditor's [sic] claims.

The court reserved consideration of whether all other aspects of the reorganization plan entitled it to confirmation.

On August 8, 1985 the bankruptcy court considered whether to confirm the debtors' plans or the bank's plan. The debtors' major objections to the bank's plan were, first, that the assets were worth substantially more than the bank was willing to pay. Second, the Gould interests

objected to the provision for consolidation of estates that had been approved in the July 23, order. The court rejected debtors' plans and approved the bank's. In its order, reported as *In re Holywell Corp.*, 54 B.R. 41 (Bkrtcy.S.D.Fla.1985), it noted that an application for rehearing and reconsideration of the July 23 order was pending; the court denied the application for rehearing.

Under the amended reorganization plan that was confirmed a liquidating trustee would be appointed and would take charge of the property. The Bank of New York would acquire the Miami Center property from the trustee, together with the furniture, fixtures, and equipment therein, for $255,600,000, a valuation based upon an MIA appraisal.[1] This purchase would be funded through cancellation of the judgment lien held by the bank (approximately $240 million)[2], plus any new cash necessary to come up to the $255.6 million figure. In addition, the bank agreed to release to the trustee $30 million realized from the sale of unrelated property located in Washington, D.C. that had been owned by some of the debtors; this cash was additional collateral held by the bank and subject to its lien.

Moreover, the bank was required to set aside $14 million, backed by surety bonds, to protect the rights of creditors affiliated with Gould, who had been found in a

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[1] The furniture, fixtures and equipment had been obtained from affiliates of the debtors pursuant to what the district court, in a separate order, had found to be leases.

[2] In separate proceedings the principal and interest due under the mortgage had been established, and the bank had been granted a final judgment for these amounts.

separate order to be lessors of equipment and fixtures located in Miami Center that had been included with the sale to the bank. This order was the subject of a separate appeal. Should the bond ultimately have to pay the lessors for the FF & E under this arrangement it would be entitled to seek reimbursement from the estate pursuant to a trustee's certificate.

Also the plan provided that certain creditors affiliated with the Gould interests would be "equitably subordinated" to claims of other creditors with lower priority because these Gould-affiliated creditors were "insiders."

The debtors had filed in the U.S. District Court a separate suit for damages charging that in connection with its loan the bank had committed fraud and various RICO violations. The approved reorganization plan provided that this case, which the bank asserted was a chose in action of the bankruptcy estate and thus due to be under the control of the trustee, was to be dismissed by the trustee.

Debtors moved in the bankruptcy court for a stay of the confirmation order pending appeal. After a hearing the bankruptcy court granted a stay conditioned upon debtors posting a bond in the amount of $140 million, based upon the court's estimate that an appeal would take a year. In October 1985, on review, the district court reduced the amount of the bond to $50 million, on the assumption an appeal could be expedited and determined in 90 days, and required the bond be filed by October 10, 1985. The debtors appealed the bond ruling to this court, which dismissed for lack of jurisdiction. The debtors did not post a bond, and, beginning October 11,

1985, the trustee and the bank set about immediately to consummate the reorganization plan as approved. The trustee conveyed to the bank's designee, a land trust, title to Miami Center and its furniture, fixtures and equipment. The bank gave up its judgment lien, and, in addition, paid approximately $13.6 million of new money, to make up the total consideration of $255.6 million. Also, it released the $30 million of additional cash collateral. The trustee began making payments to 400-plus creditors of the five estates.

On appeal to the district court the debtors attacked the consideration order and the confirmation order. They asserted that: the necessary bases for the consolidation order were not proved; various of their claims were improperly subordinated to claims of general creditors; the bankruptcy court failed to have a hearing on valuation; the reorganization plan improperly required the trustee to dismiss the separate suit filed by debtors in the federal district court; the reorganization plan discriminated against mechanics and materialmen and some unsecured creditors; and the bankruptcy court denied debtors' due process.

In November 1985 the bank and the trustee moved to dismiss the appeal to the district court as moot because no stay of the reorganization plan had been obtained.

The district court (Sidney M. Aronovitz, D.J.) held that the consolidation and confirmation orders were "intertwined and interdependent" and that the order approving the plan of reorganization "includes inferentially the effect of the [earlier] Order of Substantive Consolidation." With respect to both orders, however, the

court held that the bankruptcy court had failed to enter sufficient findings of fact and sufficient explanations of its legal reasoning to support adequate appellate review. The court remanded the matter to the bankruptcy court with directions for it:

> to schedule and to hold such further adversarial hearings and to make and enter such findings of fact and conclusions of law as are necessary to provide this Court with an adequate basis to decide the instant appeal on the merits.

Order, p. 12.

Despite its conclusion that there were insufficient findings to support appellate review, the court proceeded to address the appellees' motion to dismiss the appeal for mootness.[3] It looked to the mootness doctrine formerly stated in Bankruptcy Rule 805:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal.

It noted that although the mootness standard was not carried forward in Rule 8005, which supplanted Rule 805 in 1983, it is widely accepted in case law, including *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984). Relying upon a Ninth Circuit case, *Matter of*

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[3] The trustee had filed a mootness motion but was not a party to the appeal.

Combined Metals Reduction Co., 557 F.2d 179 (9th Cir.1977), the court held that where a debtor appeals from several orders, some of which are orders approving the sale of property, and fails to obtain a stay, the debtor may proceed with the appeal of orders not involved in the sale. Applying this principle, the district court concluded that the appeal of the consolidation order was not moot because it was not an order of sale, and because, after remand, should it [the district court] rule in favor of debtors on their appeal of the consolidation order, the court could grant meaningful relief to them by reversing that order and "that portion of the confirmation plan of reorganization which incorporates this order." Order, p. 15. Therefore, it held that it would decide the validity of the consolidation order on the merits after receipt of findings of fact and conclusions of law that it ordered entered by the bankruptcy court.

The court then turned to the confirmation order. It did not address the status of the bank as a good faith purchaser within the meaning of the mootness cases. Nor did it speak to its holdings that the consolidation order, though standing alone was not an order approving the sale of property, was an order "involved with the sale" and indeed was "intertwined and interdependent." Rather, as appears from the portions of its order quoted below, the court noted that the purchaser was a designee of the bank and within its jurisdiction, and it analyzed its ability to give "effective relief" by considering whether it was capable of undoing what had been done. The court stated that it could reverse its subordination of debtors' claims and return them to their pre-confirmation status; it could require the trustee to reinstate the separate suit that

debtors had filed; and it could review alleged procedural flaws in the valuation proceedings leading up to confirmation and in other unspecified proceedings. The court put its finger on the central dispute:

> This appeal is primarily directed at recovering title to the Miami Center property held by the bank's designee and obtaining review of the bankruptcy court's substantive rulings noted above [the rulings in the confirmation order].

Ms. Op. p. 17.

As to this central matter, the court held:

> [S]hould this court decide the substantive appeal before it in the appellants' favor, the sale of the Miami Center, and its equipment and fixtures, could be undone.

Id. at p. 18.

* * *

> Although the Miami Center is now held by the Bank's designee, it is still in the effective possession of the Bank which, as appellee in this matter, is under the jurisdiction of the court. Should this court decide, after reviewing the findings made by the court below on remand, that the entire plan of reorganization was erroneously approved, it could fairly order the transfer of the Miami Center property back to the debtors, on the condition that those funds taken from the Thirty Million ($30,000,000) Dollars collateral for payment to creditors remain undisturbed or be applied in behalf of debtors.

The court also found that it had had the unusual opportunity to observe the substantial consummation of the reorganization plan and that its "fairness, feasibility and propriety" had been verified by these occurrences:

administrative claims had been paid or reserved; secured claims had been paid in full; class 3 claims had been paid in full; undisputed claims in classes 4 through 6 had been paid in full and funds reserved for disputed claims; several disputed claims had been compromised, saving the estates millions of dollars; there remained sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (many of which were unliquidated).

Finally the court went on to hold:

> No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141. It is now legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the status quo before confirmation.

With respect to consolidation, the court found the facts, and applied the controlling law, at length. It found that in most respects creditors had not objected to consolidation, that the debtors would not be substantially prejudice by consolidation, and that the hundreds of creditors (many not represented by counsel) should not be required "to engage in a shell game" in attempting to determine which of the interrelated debtors involved in the Miami Center project would be able to pay them. The difficulty in tracing the obligation of claims against the affiliated creditors was, the court held, "completely attributable to the labyrinth that Gould has created."

The bankruptcy court confirmed the orders it previously had entered. The matter came back to the district court with the bankruptcy court's elaborate findings and

conclusions. Without addressing the mootness issue the court considered the merits and entered an order on March 20, 1986. It held that the confirmation order before it for review consisted of the initial confirmation order [entered August 8, 1985], as amended by the findings of fact and conclusions of law entered by the bankruptcy court on remand. It reiterated that the confirmation order and the consolidation order were "intertwined and interdependent." With respect to each issue relating to confirmation, including valuation, the district court reviewed the facts as found by the bankruptcy court and the applicable law and found no error. Following this careful, point-by-point review, the district court affirmed the August 8 confirmation order, as amended by the bankruptcy court's order on remand, and affirmed the order approving consolidation.

Arguably the district court should have dismissed the appeal as moot when the case was first before it. But we pretermit discussing this because we hold that the court should have dismissed the appeal as moot when the case came back to it after remand.[6]

The mootness standard is preserved in the present bankruptcy code at 11 U.S.C. § 363(m), but this provision applies only to the sale of the debtor's property by the trustee pursuant to § 363(b) or (c). Section 363(m) does

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[6] *See In re Bel Air Associates, Ltd.*, 706 F.2d 301 (10th Cir.1983) (no explicit holding by bankruptcy court on good faith purchaser issue. District court remanded to the bankruptcy court for findings, and that court ruled good faith purchaser status applied. District court adopted this determination and dismissed the appeal).

not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation. All parties agree that in this case we look for guidance to the case law.

The Eleventh Circuit, like other circuits, has recognized the continuing viability and applicability of the mootness standard in situations other than transfers by a trustee under § 363(b) or (c). *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984); *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325 (11th Cir.1985); *In re Matos*, 790 F.2d 864 (11th Cir.1986).

In *Sewanee* the mortgagees/creditors were permitted to foreclose, both district and circuit courts refused stay pending appeal, and the property was sold at foreclosure to the creditors. On appeal debtors asserted the sale should be rescinded and the property returned to them. Looking to the case law, this court dismissed the appeal as moot. *Markstein* is similar to *Sewanee*. No stay was obtained. Mortgagees/creditors purchased the property themselves at foreclosure. On appeal the debtors sought to have the sale rescinded and the property returned, or other equitable relief. This court held that it was powerless to rescind the sale. It ordered a limited remand to the district court with direction that it make specific findings as to the amount of the mortgage debt and to determine whether the bankrupt estate was entitled to excess, if any, of the foreclosure bid over the debt. The court noted that the appellant had been unable to cite, and it had been unable to locate, "any case where a court has granted relief in the situation where property of a debtor was sold at foreclosure to a good-faith purchaser after the debtor had failed to obtain a stay of foreclosure pending

appeal." But it had found no case where the amount of the mortgage debt, and of the excess, if any, had not specifically been determined, thus it remanded on these issues. 763 F.2d at 1327 n.1. No such issue is involved in the present case. With respect to the purpose of the mootness rule, the court held:

> This rule of law [lack of power in the court to rescind sale where there has been no stay] was intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial sale process upon which good faith purchasers relied.

Id. at 1327.

Matos followed in the same channel. The bankruptcy court permitted foreclosure, debtors were granted a stay conditioned on filing a bond, which they did not file. The mortgagee/creditor bought the property at foreclosure. This court dismissed the appeal as moot. We said:

> It is settled law in this circuit that when the debtor fails to obtain a stay pending appeal of the bankruptcy court's or the district court's order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal. *Markstein v. Massey Associates*, 763 F.2d 1325 (11th Cir.1985); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984). This rule of law, which is premised upon considerations of finality, protection of the integrity of the foreclosure sale process, and the court's inability to rescind the sale and grant relief on appeal even if the purchaser of the property is a party to the appeal, is fully applicable to this case. Accordingly, the appeal must be dismissed as moot. (Note omitted.)

790 F.2d at 865-66.

The "good faith purchaser" is one who buys in good faith, that is, free of any fraud or misconduct and for value and without knowledge of any adverse claim. *In re Bel Air Associates, Ltd.*, 706 F.2d 301 (10th Cir.1983); *Greylock Glen Corporation v. Community Savings Bank*, 656 F.2d 1 (1st Cir.1981). Knowledge of claims asserted in a pending appeal does not deprive a purchaser of good faith status. *In re Dutch Inn of Orlando, Ltd.*, 614 F.2d 504 (5th Cir.1980).

When the present case was returned to the district court following remand, the record before the district court included the finding that the bank was a good faith purchaser. It included the detailed findings that the plan was fair, feasible, and proper, and that it had been substantially consummated. And it included the finding that it was legally and practically impossible to unwind the confirmation of the plan or otherwise to restore the status quo. All these findings were affirmed. The debtors urge, on several grounds that the mootness standard should not apply:

> (1) The mootness rule has no applicability because there has been no transfer to a third party. This argument ties in with the district court's emphasis on the fact that the sale was to a designee of the bank which was within the jurisdiction of the court. No transfer to a third party was involved in *Sewanee, Markstein, or Matos;* in each of those cases the purchaser at foreclosure was the mortgagee/creditor, just as the bank here is the purchaser from the liquidating trustee. Other cases rejecting the "not a third party" argument include *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir.1985); *Greylock Glen Corp. v. Community Savings Bank*, 656 F.2d 1, 4 (1st Cir.1981) ("[T]he fact that the bank was

both the seller and purchaser of the property, and a party to the dismissed appeal does not affect its status under Rule 805. The rule does not distinguish between mortgage holders and other potential purchasers of encumbered property. It is designed to give finality to orders of the bankruptcy court that have not been stayed pending appeal. . . . No less than any other potential purchaser, the bank was entitled to bid upon the Greylock Glen property with the assurance that its title to the property would not be affected by appellate review months or even years later.")

(2) The bank has never been held to be a purchaser in good faith. On remand the bankruptcy court held the bank was a good faith purchaser, and the district court affirmed the bankruptcy court's findings and affirmed the confirmation order, as amended by the bankruptcy court's findings and conclusions. No factual argument is advanced why the bank is not entitled to good faith purchaser status except that the purchaser is a designee of the bank and within the jurisdiction of the court, an argument already rejected above.

(3) The mootness principle is inapplicable because the debtors do not seek return of the property but only modification of the plan, or, restating, they do not attack the sale but only matters that do not directly relate to the sale.

(4) Mootness does not apply where the purchaser has not taken irrevocable steps in reliance on the purchase.

Points (3) and (4) require us to look beyond *Sewanee, Markstein* and *Matos*. These three Eleventh Circuit cases concern single sales at foreclosure of property for which in each instance there was a good faith purchaser. In that

confined context the cases are a firm application by this circuit of a broader principle that mootness is appropriate where a court cannot give effective relief. A reorganization case, however, may sweep within its ambit more than a discrete and consummated sale to a good faith purchaser. Within a penumbra of the reorganization plan outside of discrete consummated sales there may be aspects of the reorganization that are not moot.[7] Cases of this nature include *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir.1977); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir.1986); and *In Re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir.1981). These cases tell us that in considering whether in a reorganization case matters not directly related to sales are within the mootness rule, the court may consider the virtues of finality, the passage of time, whether the plan has been implemented and whether it has been substantially consummated, and whether there has been a comprehensive change in circumstances. *AOV*, 792 F.2d at 1148-49. The court will not, however, allow a "piecemeal dismantling" of a reorganization plan. *Id.* at 1149. In *AOV* the court recognized a

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[7] The possibility of effective relief for matters unrelated to consummated sales does not, however, subsume the central principle that finality of judgments and certainty are to be protected where there have been sales to good faith purchasers. In this case the district court considered as a global question whether it could grant effective relief and concluded that it could do so because it had the power to undo the sale to the bank, restore the property and possession to the debtor, and set aside the sale provision of the reorganization plan. This analysis stood the law of mootness on its head.

"strong presumption" of mootness. *Id.* The court may consider whether relief granted by the court could implicate or have an adverse effect on non-party creditors and will affect the re-emergence of the debtor as a revitalized entity. *Id.* In *Roberts Farms* the court considered whether the property transactions "stand independently and apart from the plan of arrangement," and found that "the many intricate and involved transactions . . . were contemplated by the plan of arrangement (even to and including liquidation and reorganization of the debtor corporation) and stand *solely* upon the order confirming the plan of arrangement for court approval and confirmation of the transactions." 652 F.2d at 797. The court concluded that to deny mootness and reverse would "knock the props out from under the authorization for every transaction that has taken place" and "create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Id.* The Eighth Circuit, *In re Information Dialogues,* 662 F.2d 475 (8th Cir.1981), refers to the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained. In *Matter of National Homeowners Sales Service Corp.*, 554 F.2d 636 (4th Cir.1977) the Fourth Circuit, in sustaining good faith purchaser status and dismissing the appeal as moot, relied upon substantial investment that had been made upon reliance of good title to the property having vested in the purchaser.

The debtors acknowledge that the plan of reorganization has been substantially consummated, but, they say, it remains not completed in several respects, as follows: The trustee is claiming substantial additional sums from the bank as a result of examination and audit of the bank's

interest charges and other closing adjustments in the sale of the Miami Center property. If the bank must pay the lessors for FF & E, it will seek repayment from the estate pursuant to the trustee's certificate, which will deplete sums available to Gould-affiliated creditors. Some disputed claims have yet to be resolved. It is unknown whether claims of Gould-affiliated creditors will be paid in full because some have been assigned a junior priority.

We turn, then to the relief that the debtors seek and the relationship between it and the reorganization plan. The debtors now say that, although they do not agree with the validity of the sale to the bank, they do not seek to overturn it; indeed, they specifically say that they do not want the property back. They want the sale to stand but the property revalued to a higher figure and the sale price adjusted accordingly. They seek cancellation of the trustee's certificate issued to the bank to cover its exposure with respect to the FF & E. They want a realignment of priorities of claims that will place some of their claims ahead of other unpaid creditors and give some "super priority" ahead of the bank as mortgagee. They want reinstatement of the separate suit they filed against the bank.

The debtors recognize that the relief they request may require the bank's putting up additional cash to preserve its position as purchaser; if so, the bank must sweeten the pot. If it is unwilling to do this, it may have to fall back on its rights as mortgagee.

These prayers for relief must be set against what the bank bargained for, and received, as part of the reorganization plan, and the consequences to the plan of granting

the prayers. The bank agreed to give up its judgment, calculated at closing at around $242 million. The amount due under the mortgage and brought forward into the judgment was calculated at "good standing" interest rates; by agreeing to this calculation the bank surrendered a claim to $5 million-$6 million of interest at default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.

Closing the sale to the bank stopped the running of interest at approximately $2 million per month. If the sale goes for naught, presumably the bank can seek interest from October 1985, producing an accrual when Judge Aronovitz entered his March 1986 order of approximately $11 million and currently approximately $54 million.

The bank bargained for and purchased the FF & E as part of the sale. Because litigation was in progress over whether title to the FF & E was in lessors of the bankrupt, the bank put up $14 million to pay the lessors if they prevailed. But, since the bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from the double payment. Without the trustee's certificate, if double payment ensues, the bank will become an unsecured creditor to the extent of some $14 million. The debtors do not suggest any relief for this risk.

The bank put up $12.5 million of its own money to make up the purchase price. It surrendered $30 million of cash collateral it was holding. These funds have been the primary source for payments to creditors and reserves totalling approximately $30 million. The trustee appeared before the district court when after remand, it heard

argument. He pointed out that he had paid some $14 million in claims, had reserved some $9 million for claims disputed or in litigation, and held some $8 million-$9 million in cash plus some $7 million in a reserve for contested taxes. The trustee pressed his view that the reorganization plan had to be accepted or rejected in its entirety and that rejection would require him to seek to reclaim what he had paid out, much of which was unrecoverable.

The bank might, of course, not wish to become purchaser of the property at an elevated price or to assume the risk of paying twice for FF & E. It might wish to realize on the cash collateral it had held and to foreclose on the real estate. The debtors have not given a meaningful suggestion of how the bank can get back its $12.5 million or get back the $30 million cash collateral; they say only that creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them.

The bank bargained for dismissal of the separate suit as part of the consideration running to it. The debtors want the case reinstated but do not point to any means of restitution to the bank for being again placed at risk of a fraud/RICO case and subjected to attorney fees for its defense.

All of this demonstrates that the consequences of what debtors seek strike at the sale to the bank and the reorganization plan as a whole. As in *Roberts Farms* the sale of the primary asset does not "stand independently and apart from the plan of arrangement," but rather "the

many intricate and involved transactions . . . were contemplated by the plan of arrangement . . . and stand *solely* upon the order confirming the plan of arrangement." 652 F.2d at 797.[8] It is "impossible to fashion effective relief" for the bank. *Id.* Granting the remedies the debtors seek would "create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Id.*

The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified, and that it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation. The district court was required to dismiss the appeal as moot.

We turn to No. 86-5386: The district court held that the bankruptcy court had the power to order the trustee to dismiss the separate fraud/RICO case because: (1) it was a chose in action which was part of the debtors' estate; (2) on remand the bankruptcy court had conducted a cost/benefit analysis of the value of the suit and concluded that its value was nil; (3) evidence adduced at a post-remand hearing showed that releases previously

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[8] The district court found twice that the consolidation order and the confirmation order were intertwined and independent.

signed by debtors barred their pursuing the civil action on principles of collateral estoppel.[9]

Judge Aronovitz entered his order affirming the consolidation and confirmation orders on March 20, 1986. On April 30, 1986 District Judge Hoeveler dismissed the fraud/RICO suit, quoting the grounds set out above and, accordingly, entered a dismissal as "an administrative necessity . . . compelled by the decision of the Bankruptcy Court below and the affirmation of that decision by Judge Aronovitz."

Had the appeal to the district court on the consolidation and confirmation orders been dismissed as moot, as it should have been, the judgment of the bankruptcy court in that appeal would have become final. The issues adjudicated by that judgment would then have been precluded from reexamination by Judge Hoeveler in his consideration of whether to dismiss the fraud/RICO case. These same consequences will ensue now upon the entry of an order by Judge Aronovitz dismissing the appeal from the bankruptcy court as moot.

The debtors contend that as a matter of separation of powers the bankruptcy court could not require the

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[9] The bankruptcy court held that it was within the scope of its authority in making this determination because the debtors' right to pursue this action was a matter concerning the administration of the estates, and/or a counterclaim by the estate against persons filing claims against the estate, and/or confirmation of plans, and/or other proceedings, affecting the liquidation of the assets of the estate, and therefore constituted a "core proceeding."

district court to give up its jurisdiction. This is not what happened. In October 1985, some five months before Judge Aronovitz affirmed the bankruptcy court, the liquidating trustee, on behalf of the debtors, filed a "stipulation" for dismissal with prejudice of the district court case. All parties asked that consideration of the trustee's "motion" to dismiss be postponed until the bulk of the bankruptcy proceedings had been resolved.

After Judge Aronovitz entered his ruling and plaintiffs failed to post an appeal bond to stay the implementation of the reorganization plan pending appeal to this court, the liquidating trustee filed a new motion requesting the court to order dismissal of the district court case. Thus, the liquidating trustee, found by the bankruptcy court to be in control of the separate case as an asset of the debtors' estates, was directed to dismiss the separate suit, he sought to have it dismissed, and Judge Hoeveler responded by entering a dismissal. Dismissal of lawsuits that are assets of the estate is a not-unfamiliar feature or reorganization plans. Debtors' suggestion that the bankruptcy court lacks power, exercised pursuant to a reorganization plan, to direct a trustee to dismiss a suit in a court other than the bankruptcy court is not supported by authority cited to us or by common sense. The underpinnings of the bankruptcy court's order to the trustee will be finally determined by the bankruptcy court order once the finality of that order is established by the mootness of the appeal to the district court. As now recognized, though retrospectively, the district court's order dismissing the separate suit, as requested by the trustee, will be correct and will be due to be affirmed.

Conclusion

We VACATE the order of September 8, 1987 appearing at 826 F.2d 1010.

In No. 86-5286 we VACATE the judgment of the district court affirming the consolidation order and the confirmation order of the bankruptcy court and REMAND that case to the district court with instructions to dismiss the appeal to it from the bankruptcy court as moot.

Forthwith upon entry of the order by the district court, as directed in No. 86-5286, the judgment in No. 86-5386 shall stand AFFIRMED.

The petition for rehearing by the Bank of New York is DENIED. The petition for rehearing by the appellants is DENIED.

No member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Bank is DENIED.

APPENDIX O

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re: HOLYWELL CORPORATION, et al., Debtors.	CASE NO. 84-01590-BKC-TCB CHAPTER 11

ORDER ON DEBTORS' MOTIONS FOR PAYMENT OF THEIR "SUPER-PRIORITY" CLAIMS

In January, February and April, 1985, these five related chapter 11 debtors obtained permission under 11 U.S.C. § 364(c) to borrow money to meet operating emergencies. The debt was secured by giving the lenders priority administrative liens. (C. P. Nos. 313, 404 and 492). A total of $4,717,404 was borrowed to complete construction of the Miami Center, pay property taxes, and pay other operating expenses. About $5.5 million is presently owed upon these obligations, which accrue interest at the rate of $1,113 a day.

A few months later, in August 1985, a liquidating plan was confirmed by this court (C. P. No. 906) and a liquidating trustee was directed to liquidate the debtors' estates and discharge all obligations, including these. There are some 400 creditors with claims of $350 million and the trustee has not yet completed his task. The protracted and costly delay has resulted from still pending appeals of this court's orders and from litigation pending in non-bankruptcy courts between these debtors and many of their major creditors over the amounts owed.

The trustee reported at this hearing that if all existing court orders remain undisturbed, he will have sufficient funds to pay all remaining claims in full with interest, including these claims. However, because of the present uncertainties and contingencies, the issues here today (and a number of others) remain hotly contested. The debtors, a non-debtor subsidiary (Twin), a creditor affiliated with the debtors (MCJV), the debtors' major creditor (BONY) and the trustee have all argued this issue. (C. P. Nos. 1506, 1516, 1542, 1544, 1553, 1554, 1554a and 1556).

The lender/movants, Holywell and Gould (two of the five related debtors) and Twin (a wholly-owned subsidiary of the debtor Holywell), want immediate payment of the $5.5 million due them, together with a declaration that the money is not subject to any contingent claim of the trustee. BONY opposes the motions. It argues that movants' claims are subordinate to the unliquidated class 7 claim of MCJV, which totals $14.4 million, and that the repayment would be owned by the trustee and would, therefore, be a meaningless "wash" transaction. The affiliated creditor, MCJV, and the trustee, neither of whom is directly affected, support the movants. BONY's objections are not persuasive.

The reimbursement priority granted to these three lender/movants in the 1985 orders is unambiguous. The following pertinent paragraph appears in each order:

> "The loan to Miami Center Limited Partnership shall be secured by a lien on the assets of Miami Center Limited Partnership which shall be senior to the lien of all other creditors, except the lien of the Bank of New York, and shall have

> priority over the payment of any and all administrative expenses of Miami Center Limited Partnership."[1]

The three loans are to be paid as soon as (a) the lien of the Bank of New York is fully satisfied and (b) the assets of *Miami Center Limited Partnership* (not the assets of the subsequently consolidated five debtors) are sufficient to meet the obligation.

The original lien of the Bank of New York as it then existed and as it was then envisioned was fully satisfied by the trustee's sale in October 1985 of the Miami Center property to the Bank's nominee.[2]

The parties did not then anticipate, much less intend, that this provision include the Bank's subsequent lien created by the July 30, 1985 Second Amendment to the Amended Plan (C. P. No. 479). In that subsequent transaction, the Bank agreed to fund, up to a limit of $14,417,679, any shortage in the trustee's ability to pay the MCJV lease claim after it has been finally settled or adjudicated, which has not yet happened. The Bank will then get as security a trustee's certificate which will be an administrative claim (class 1):

> "secured by, all assets of the debtors' estates after payment or provision has been made for all other Class 1 claims . . . " (Bank's Notice of Filing of Second Amendment, C. P. No. 854, ¶2).

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[1] The differences in the three variants of this paragraph are inconsequential.

[2] The district court reached this conclusion in its affirmance of this court's confirmation order. *Holywell Corporation, et al., v. Bank of New York*, 59 B.R. 340-46 (S.D.Fla. 1986).

It is clear that the Bank's subsequently acquired lien for its contingent advance to the trustee is *subordinate* to the movants' administrative claims. Therefore, neither the Bank nor the trustee has any present or potential claim based upon this transaction which is superior to movants' claims.

The Bank also argues that the substantive consolidation of the five estates, which was provided in the plan confirmed in August 1985, extinguished these debtor claims. The plan, which must be strictly construed against its proponent, the Bank, makes no explicit provision for this result. It was not suggested by the Bank in the Disclosure Statement or otherwise before confirmation. Movants' claims and their repayment are *post-petition* debts and assets. There is no presumption that consolidation embraced post-petition transactions and this nullified this court's post-petition orders. On the contrary, the liquidating trust created by the plan includes only §541(a) prepetition assets. I reject the Bank's interpretation of the consolidation provision.[3]

The Bank argues, finally, that the subordination of claims of creditors affiliated with the debtors to class 8, behind all other creditors including the class 7 claim of MCJV, requires that payment of movants' post-petition claims to Holywell and Twin (who are affiliated creditors) is subordinated to payment of class 7 prepetition debt. I

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[3] The district court reached this conclusion in its affirmance of this court's confirmation order. *Holywell Corporation, et al., v. Bank of New York*, 59 B.R. 340, 347 (S.D.Fla. 1986).

reject the Bank's interpretation of the subordination provision for the same reason I have rejected its interpretation of the substantive consolidation provision. If the Bank intended by this provision to subordinate post-petition claims and thus nullify this court's three earlier orders, it should have revealed that intention explicitly.

I have not overlooked the Bank's argument that since the money used by movants to make the loans at issue here came from cash collateral pledged to payment of the Bank's original lien, rather than from an outside source, it is inappropriate or implausible that the reorganized debtors now be accorded a claim to repayment of those loans superior to the Bank's claim. The short answer to this argument is that the Bank neither demanded nor received a continuing lien as to these funds. Quite possibly it failed to do so because it hoped for reversal of this court's adverse "true-lease" ruling and because it knew it would have to make these operating advances itself, if the debtors did not, in order to preserve its collateral. Whatever the reason, it failed to retain its lien after its original debt was satisfied.

The trustee is authorized and directed *to pay these claims* if and when the proceeds of the liquidation of the assets of MCLP are sufficient to meet these priority obligations. I am not now aware of any present or potential claim which the trustee may have against the repayment proceeds.

DONE and ORDERED in Miami, Florida this 20th day of March, 1987.

/s/ Thomas C. Britton
Chief Bankruptcy
Judge

APPENDIX P

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re: HOLYWELL CORPORATION, et al., Debtors.	CASE NO. 84-01590-BKC-TCB CHAPTER 11

ORDER DENYING RECONSIDERATION

The motion (C.P. No. 1567) of the Bank of New York for rehearing or clarification of the Order on Debtors' Motions for Payment of their "Super-Priority" Claims dated March 20 (C. P. No. 1564) was heard on March 30. The motion is denied. The Bank's application under B.R. 8005 for supersedeas is granted by a separate order.

One point made by the Bank merits comment. The Bank objects to the following sentence in the eighth paragraph:

> "On the contrary, the liquidating trust created by the plan includes only §541(a) prepetition assets."

I agree with the Bank that the liquidating trust includes all §541(a)(1) through (7) assets. I also agree that I am bound by the statement in *In re Wilson*, 694 F.2d 236, 238 (11th Cir. 1982):

> "Although we agree that §541(a)(7) does not render every 'interest in property that the estate acquires after the commencement of the case' available for the debtor's exemption claims, we find that §541(a)(7) does bring into the estate

> every such interest not covered by a specific statutory provision mandating some other treatment."

The sentence objected to by the Bank was not necessary to this decision and should be disregarded. The plan includes all §541(a) assets and, therefore, may include assets acquired after the commencement of the case.

The foregoing correction does not affect the conclusion I reached in the paragraph – the substantive consolidation of the five estates, provided in the plan, did not extinguish any of the post-petition claims presently under consideration. I remain persuaded that this would be an impermissible interpretation of the Bank's plan. The district court reached the same conclusion after hearing this same argument. If this result was in fact intended by the Bank when it presented this plan, it should have been made explicit. I would not have confirmed a plan nullifying the 1985 orders that are at issue here.

Although the Bank argues that the money repaid by the trustee to the debtors on the claims at issue here would be owned by the trustee and would, therefore, be a meaningless "wash" transaction, that was not clear at the March 30th hearing (where the trustee reported to the contrary), and thus this argument affords no present predicate for denial of these motions. Indeed, the trustee has urged payment of these claims. It is not now necessary and it would be imprudent to anticipate issues that are not immediately presented by these motions.

DONE and ORDERED in Miami, Florida this 1st day of April, 1987.

/s/ Thomas C. Britton
Chief Bankruptcy
Judge

APPENDIX Q

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11
Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW
Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES AND THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION AND THEODORE B. GOULD,

Defendants.

FINAL JUDGMENT

In conformity with the Findings of Fact and Conclusions of Law of even date, it is hereby

ORDERED AND ADJUDGED that the liquidating trustee of the Miami Center Liquidating Trust is not responsible for filing federal income tax returns on behalf of the debtors or liable to the United States of America for federal income taxes, if any, due on gain realized from the sale of real estate in Washington or from the sale of the Miami Center in Miami, Florida.

DONE AND ORDERED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES AND THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION AND THEODORE B. GOULD,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on before the Court upon the Complaint of the liquidating trustee of the Miami Center Liquidating Trust (the "trust") against the United States of America (the "government"), the Bank of New York (the "bank"), Theodore Gould ("Gould"), Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Holywell Corporation (the "debtors") for a declaration of the responsibility of the trust to file and/or pay federal income taxes to the government upon gain realized from the sale of real estate and the Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of the witnesses, considered the arguments of counsel and being otherwise

fully advised in the premises does hereby make the following Findings of Facts and Conclusions of Law:

The facts are not in serious dispute. The debtors filed voluntary chapter 11 petitions on August 22, 1984, and the cases were substantively consolidated for all purposes. Shortly after the commencement of the chapter 11 proceedings, the debtors moved the Court for an order authorizing consummation of a prepetition contract for the sale of real estate in Washington (the "Washington properties"). Pursuant to order of this Court, the sale closed in December, 1984 and January, 1985, with the net proceeds due to Gould, Holywell, and Twin Development Corporation, a wholly owned non-filed subsidiary of Holywell, being placed in controlled accounts. The Court determined the proceeds of the sale were subject to the bank's lien, and entered a cash collateral order.

Thereafter, both the debtors and the bank proposed plans of reorganization which utilized the proceeds from the preconfirmation sale of the Washington properties and the post-confirmation sale of another parcel of real estate (the "Miami Center") as the sources of funds for payment of creditors. However, neither plan expressly provided for the payment of federal income taxes, if any, due on gain realized from those sales. The bank's Amended Consolidated Plan of Reorganization (the "plan") was confirmed on August 8, 1985, and became effective on October 10, 1985, after the debtors failed to supersede the order of confirmation. The confirmation order was affirmed by the district court, 59 Bankr. 340 (S.D. Fla. 1986), and the 11th Circuit Court of Appeals dismissed an appeal of the order as moot because the

plan was substantially consummated. *Miami Center Limited Partnership v. Bank of New York*, Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988).

The confirmed plan creates a trust and requires that a liquidating trustee be appointed whose responsibilities include the identification and payment of all valid claims against the estate with the payment of the sum remaining to the debtors. The trust corpus consists of all the debtors' 11 U.S.C. Section 541 (a) defined assets (including the stock of all the wholly-owned subsidiaries), and the Washington proceeds. Soon after the liquidating trustee took control of the trust, he sold the Miami Center to the bank's nominee and the proceeds became a part of the trust corpus.

The government was listed as a creditor. It was involved in other tax disputes with the debtors and had notice of the bankruptcy proceedings. The government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gain taxes. The government did none of these things.

As conceded by the government and the debtors, the trust is not a separate taxable entity. However, the government and the debtors argue that the trust is responsible for filing an income tax return on behalf of the debtors and to pay the tax due, pursuant to 26 U.S.C. §§ 6012(b) (3), (b) (4), and 6151. The government supports this position by arguing that the liquidating trustee is a "trustee in a case under title 11 of the United States Code,

or assignee . . . ," under 26 U.S.C. § 6012 (b) (3), thereby subjecting the trust to liability for taxes. The government also argues that the trust is responsible for taxes under 26 U.S.C. § 6012(b) (4) because it is "a trust, or an estate of an individual under Chapter 7 or title 11 of the United States Code [and payment] should be made by the fiduciary thereof." 26 U.S.C. § 6012(b) (4) (bracketed material added). Both the government and the debtors principally rely upon *In the Matter of I. J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974) to support their argument that the trust is responsible for these taxes.

The liquidating trustee argues that 26 U.S.C. § 6012 (b) (3), (b) (4) and *I. J. Knight*, 501 F.2d 62 are not applicable because the liquidating trustee in the case *sub judice* is not a trustee in a case under title 11 of the United States Code. The liquidating trustee also argues that 26 U.S.C. §§ 6012 (b) (3) and (b) (4) are not applicable because the trust is a grantor trust, as defined under Subpart E of Subchapter J of the Internal Revenue Code, 26 U.S.C. §§ 671-69 and as such the trust is not a taxable entity under the Internal Revenue Code. The liquidating trustee cites *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985), as support for his position that the trust is a grantor trust and therefore not responsible for filing tax returns or paying federal income taxes due, if any, on the sale of either the Miami Center or the Washington properties.

The *I. J. Knight* court found that a non-operating trustee appointed under Title 11 of the Bankruptcy Code was "liable for payment of federal taxes on income generated during liquidation and distribution of the bankrupt estate" pursuant to 26 U.S.C. § 6012 (b) (3). *I.J. Knight*, 501 F.2d at 62. The reliance on *I.J. Knight* by the debtors and

the government is misplaced for the Court finds that the liquidating trustee is not a trustee appointed in a case under title 11. The liquidating trustee was appointed by the court as part of a confirmed plan of reorganization and his actions are limited to the powers granted to him in the plan and the order of confirmation. The plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan. Once that function is served, the liquidating trustee and the trust will cease to exist. Therefore the Court finds that the liquidating trustee, being a creature of a contract, is a contract trustee.

It is well-settled that tax statutes are "not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government." *Greyhound Corporation v. United States*, 495 F.2d 863 (9th Cir. 1974). The obvious reasoning for this rule of construction is that the power to tax is the power to destroy, and "Congress could very easily have manifested any other intent by a limiting or qualifying provision." *Frankel v. United States*, 192 F. Supp. 776 (D. Minn. 1961), affirmed, 302 F.2d 666 (8th Cir. 1962), cert. denied, 371 U.S. 903, 83 S.Ct. 209, 9 L.Ed.2d 165 (1962). Therefore the Court finds that the liquidating trustee is not liable for payment of federal taxes, if any are due, under 26 U.S.C. § 6012 (b) (3) since by its language it applies only to a trustee in a case under title 11.

Furthermore, the Court finds that the liquidating trustee is not an assignee within the meaning of 26 U.S.C. § 6012 (b) (3) or a fiduciary under 26 U.S.C. § 6012 (b) (4). The liquidating trustee's duties and powers under the

plan are limited. The liquidating trustee does not possess discretionary authority as to the disposition of plan's assets. The liquidating trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of the trust assets in accordance with the terms of the confirmed plan. The liquidating trustee's functions are more closely analogous to those of a disbursing agent than to an assignee or a fiduciary and, as such, he is not subject to tax liability as provided in 26 U.S.C. §§ 6012 (b) (3) OR (b) (4). *See In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980).

Additionally, there was no assignment of the debtors' properties except as provided in the plan. The plan does not provide for the trust to file tax returns reflecting the sale of the properties in question or for the trust to pay taxes on those sales. If Congress had intended to hold a disbursing agent or contract trustee liable to file a tax return and to pay taxes, it could have explicitly provided for this in 26 U.S.C. §§ 6012 (b) (3) and (b) (4) or elsewhere in the International Revenue Code. *Alan Wood Steel*, 7 Bankr. at 700. This court lacks authority to extend 26 U.S.C. §§ 6012 (b) (3) OR (b) (4) beyond the clear import of their language. *See Greyhound Corp*, 495 F.2d 863 and *Alan Wood Steel*, 7 Bankr. 697.

The liquidating trustee and the trust are also not liable for any taxes that may be due and owing to the government because the trust is a grantor trust and, as such, it is not a taxable trust under the Internal Revenue Code. *See* Subpart E of Subchapter J, 26 U.S.C. §§ 671-79 and *Sonner*, 53 Bankr. 859. Under 26 U.S.C. §§ 671-79, a grantor who has retained specified powers exercisable

without the approval or consent of an adverse party is considered the owner of the trust and is taxed individually. *United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983), *aff'd*, 761 F.2d 1056, 1060-61 (5th Cir. 1985). The retention of power is manifested by the grantor's or non-adverse party's ability to control the beneficial enjoyment of the corpus or the income therefrom, or to receive income from the trust. 26 U.S.C. § 675 and 677. An adverse party is defined as a party which has a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of its powers regarding the trust. 26 U.S.C. § 672(a). The liquidating trustee is not an adverse party under the Internal Revenue Code. 26 U.S.C. Section 672(a). *See also Buttorff*, 563 F. Supp. 450 and Treas. Reg. §§ 1.672(a)-(1a), (a)-1(b).

Pursuant to 26 U.S.C. § 677(a), the grantor of a trust is treated as the owner if the income of the trust is "or, in the discretion of the grantor or a non-adverse party, or both, may be" applied to discharge a legal obligation of the grantor. *Sonner*, 53 B.R. at 863; 26 U.S.C. § 677(a); Treas. Reg. § 1.677(a)-1(d). Here, the debtors are the grantors of the trust, pursuant to the confirmed plan. The debtors' property became the property of the bankruptcy estate upon the filing of the Chapter 11 petitions and that estate was transferred to the trust pursuant to the terms of the plan. The entirety of the trust – its corpus and any income earned therefrom – is required under the plan to be used to discharge the legal obligations of the debtors. Any remainder is required to be paid back to the discharged debtors.

Treas. Reg. § 1.677(a)-1(d) unequivocally states that a trust whose income is used to discharge a grantor's legal

obligations is a grantor trust. Additionally, Treas. Reg. § 1.677(a)-1(d) specifies that if the grantor, or a non-adverse party may, in their discretion, use trust income to satisfy the grantor's legal obligations, the trust is a grantor trust. *See* Treas. Reg. § 1.677(a)-1(d) and 26 U.S.C. § 677(a).

For the trust to be considered a taxable entity, the trustee must have as one of his permitted powers discretion as to which of the grantor's legal obligations to satisfy. The liquidating trustee in this case has no such discretion. Under the plan and 11 U.S.C. § 1142(a) neither the liquidating trustee or the grantors/debtors possess the discretionary power to decide how to disburse the assets of the trust to satisfy the grantors/debtors' legal obligations. The confirmed plan delineates the exclusive method of disbursement to the creditors.

The *Sonner* case directly supports this analysis. In *Sonner*, the debtor's voluntary Chapter 11 proceeding resulted in a confirmed plan of reorganization which required the debtor to convey his interest in certain parcels of real estate to a creditors' trust. The creditors' trust provided for the liquidation of the real estate at specified prices for the benefit of the debtor's creditors, with any remainder to be conveyed back to the debtor. This is precisely what the confirmed plan in the instant case provided. Specifically, the creditors' trust in *Sonner* required the liquidating trustee to hold and distribute the proceeds from the sale of the debtor's real estate in accordance with the terms of the confirmed plan. Like the plan herein, the creditors' trust in *Sonner* did not provide for the payment of taxes. The issue in that case was "whether the creditors' trust is the entity responsible for

the payment of tax resulting from the sale of the parcels of real estate." *Sonner*, 53 B.R. at 860. The *Sonner* court noted that the intent of the debtor and his creditors, as is the case herein, was to use the trust as a vehicle simply for the purpose of liquidating the properties to pay creditors, and to return any excess to the debtor.

The *Sonner* court held that the creditor's trust was not responsible for the payment of a capital gains tax resulting from the sale of property. 53 Bankr. at 866. The court held that the creditors trust was a grantor trust, as defined in Subchapter J of the Internal Revenue Code, and the grantor-debtor, as owner of the trust, was liable for the taxes. *Sonner*, 53 Bankr. at 866. The Court agrees with and therefore adopts the reasoning found in the *Sonner* case thereby finding that the liquidating trustee is not liable for payment of federal income taxes, if any, that were incurred by the sale of the Miami Center and the Washington properties since the trust is a grantor trust and a non-taxable entity under the Internal Revenue Code. *Sonner*, 52 Bankr. 859. *See also Stockton v. United States*, 335 F. Supp. 984, 986 (C.D.Ca.1971) (where the purpose of the trust is to extinguish the grantor's indebtedness, the grantor is treated as the owner of the trust for income tax purposes and the trust is not considered a taxable entity).

For the Court to conclude otherwise would be inconsistent with the recent ruling by the Eleventh Circuit Court of Appeals in *Miami Center Limited Partnership v. Bank of New York*, Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988). The payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan. *See* 11 U.S.C. 1127(b); *In re Northampton*

Corp., 59 Bankr. 963, 968-69 (E.D. Pa. 1984); *In re Seminole Park & Fairgrounds, Inc.*, 505 F. 2d 1011, 1014 (5th Cir. 1974); *See in re Hayhall Trucking, Inc.*, 67 Bankr. 681,684 (Bankr.E.D.Mich. 1986); *See also Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697,701 (10th Cir. 1964); *In re At of Maine, Inc.*, 56 Bankr. 55, 57 (Bankr.D.Me. 1985); *In re Heatron*, 34 Bankr. 526 (Bankr.W.D.Mo. 1983).

As noted by the court in *Miami Center Limited Partnership* when dismissing the appeal, it is legally and practically impossible to unwind the confirmation of this plan or to otherwise restore the status quo. The Court will not allow a "piecemeal dismantling" of a reorganization plan. *See In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir. 1978). The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracticable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan

In summary, the Court finds that the liquidating trustee is not responsible to file income tax returns or to pay income taxes, if any are due and owing, resulting from the sale of the Miami Center or the Washington properties.

A separate Final Judgment of even date has been entered in conformity herewith.

DATED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

APPENDIX R

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO: 88-0795-CIV-KEHOE
88-1053-CIV-KEHOE

IN RE:

HOLYWELL CORPORATION, et al.,

Debtors.

_____/

THE UNITED STATES OF AMERICA,

Appellants,

v.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, et al.,

Appellees.

_____/

HOLYWELL CORPORATION, THEODORE B. GOULD, et al.,

Appellants,

v.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, et al.,

Appellees.

_____/

MEMORANDUM OPINION

(Filed July 31, 1989)

This is a consolidated appeal from the Bankruptcy Court's entry of Final Judgment and Findings of Fact and Conclusions of Law on April 28, 1988, in the adversary proceeding of *Fred Stanton Smith, as Trustee for the Miami Center Liquidating Trust v. The United States of America, et al.*, Adv. No. 87-0627-BKC-SMW-A. The Appellants challenge the Bankruptcy Court's ruling that the Trustee of the Miami Center Liquidating Trust ("the Liquidating Trustee") is not responsible for the filing of federal income tax returns and payment of taxes due on gains, if any, derived from the sale of real property in Miami ("the Miami Center property") and Washington, D.C. ("the Washington properties"). After careful review, and for the reasons explained below, the Court hereby AFFIRMS the ruling of the Bankruptcy Court.

I. The Facts

The present appeal has its genesis in the bankruptcy proceedings initiated in 1984 by the Appellants Holywell Corporation, Chopin, Associates, Miami Center Corporation, Miami Center Limited Partnership and Theodore B. Gould ("the Debtors").[1] Following their default on a mortgage issued by the Bank of New York ("the Bank") for development of the Miami Center project, the Debtors filed voluntary petitions pursuant to Chapter 11 of the Bankruptcy Code. Both the Bank and the Debtors submitted competing reorganization plans and accompanying disclosure statements. The Internal Revenue Service ("IRS"), as a scheduled creditor, received copies of the

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[1] For a more detailed recitation of the facts underlying these bankruptcy proceedings, *see Holywell Corp v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986).

disclosure statements and plans and was notified of all confirmation hearings held before the Bankruptcy Court. The IRS filed no objections to either the disclosure statements or the plans. After overwhelming approval by the creditors, the Bank's Amended Plan of Reorganization was confirmed by the Bankruptcy Court on October 10, 1985. The Confirmation Order was affirmed on appeal. *Holywell Corporation v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986). The Debtors' subsequent appeal to the United States Court of Appeals for the Eleventh Circuit was dismissed as moot, on the grounds the Amended Plan was substantially consummated and no effective relief could be fashioned. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). The Supreme Court of the United States has denied the Debtors' petition for writ of certiorari. *Miami Center Limited Partnership v. Bank of New York*, ___ U.S. ___, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). The IRS did not participate in any of the appeals challenging the Confirmation Order.

The Amended Plan called for consolidation of the Debtors' estates, establishment of a Liquidating Trust on behalf of the Debtors and appointment of a Liquidating Trust. The Amended Plan was funded by all of the Debtors' assets, as defined in Section 541(a) of the Bankruptcy Code, including proceeds from the preconfirmation sale of the Washington properties and postconfirmation sale of the Miami Center property. Although any gains from the sale of the Washington properties would have been realized during the fiscal year ending July 31, 1985, the corporate Debtors did not file a tax return reporting the sale until January 4, 1988, at which time they requested the Liquidating Trustee to pay the

taxes owed. Further, neither the corporate Debtors nor the Liquidating Trustee filed a tax return for the fiscal year ending July 31, 1986, which would have included gains realized from sale of the Miami Center property.

After being advised by counsel that, in his opinion, the Liquidating Trustee was not subject to taxation on any gains derived from the sale of the properties, the Liquidating Trustee filed an adversary complaint in United States Bankruptcy Court seeking a declaratory judgment to that effect. On April 28, 1987, the Bankruptcy Court issued a Final Judgment and Findings of Fact and Conclusions of Law in the Liquidating Trustee's favor. Both the United States of America ("The USA") and the Debtors filed notices of appeal; the appeals were consolidated by this Court. On June 20, 1988, the Court granted the Appellants' Emergency Motion to Stay the Final Judgment of the Bankruptcy Court. The Court also granted the motion of the law firm of Shutts and Bowen, special counsel to the Liquidating Trustee, to intervene in the consolidated appeal for the purpose of seeking a lift of the stay so as to permit the Liquidating Trustee to disburse attorneys' fees and costs owed to the firm in the total amount of $917,000. Further, the Bank has moved to dismiss the appeal as moot, and the Liquidating Trustee has moved for authorization to consummate the settlement with Dade County of *ad valorem* tax claims.

II. Mootness

The Bank has moved to dismiss the instant appeal as moot in light of the dismissal on that ground of the Debtors' appeal from confirmation of the Amended Plan

of Reorganization. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). The Appellants here, however, do not primarily challenge the Amended Plan; instead, they seek to enforce its provisions, which they contend include payment of federal income taxes. To that extent, therefore, their appeal does not represent an impermissible attempt to effect "piecemeal dismantling" of the Plan and should not be dismissed as moot. *Fred Stanton Smith, et al. v. United States of America*, Adv. No. 87-0627-BKC-SMW-A, Findings of Fact and Conclusions of Law at 11. The motion to dismiss is meritorious, however, as to the Debtors' alternative and contrary argument which indeed does challenge the Amended Plan as amounting to a fraud on the IRS in its *failure* to provide for payment of federal income taxes.[2] *See also* 11 U.S.C. §1144. Accordingly, the Bank's motion to dismiss the appeal as moot is GRANTED in part and DENIED in part, as explained above.

III. Standard of Review

It is axiomatic that a Bankruptcy Court's findings of fact must be affirmed unless clearly erroneous. B.R. 8013; *Wilson v. Huffman* (In re Missionary Baptist Foundation of America), 712 F.2d 206, 209 (5th Cir. 1983). Conclusions of law, however, are reviewed on a *de novo* basis. *Machinery Rental, Inc. v. Herpel* (In re Multiponics), 622 F.2d 709, 713 (5th Cir. 1980).

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[2] Even assuming, *arguendo*, this belated allegation of fraud is not moot, there is no support for it in the record before this Court.

IV. The Merits

The Appellants argue that the Amended Plan of Reorganization obligates the Liquidating Trustee to file tax returns for the fiscal years in which gains, if any, were derived from the sale of the Washington and Miami Center properties, and to pay all taxes owed. While the Amended Plan makes no express provision for payment of such taxes, the Appellants contend that they represent administrative expenses.

The Amended Plan provides for payment of administration claims, consisting of "actual, necessary expenses" of preserving the consolidated bankrupt estate or of operating the Debtors' businesses, and of Court-approved allowances. Amended Plan, Art. I at 3. The Amended Plan defines an "allowed claim" as one for which proof of claim has been filed or a liability scheduled by the Debtors. *Id.* at 4. Since the IRS never filed such a proof of claim for the taxes at issue and the Debtors never scheduled them as a liability, their claims do not appear to represent allowed administrative claims under the terms of the Amended Plan. Further, even assuming the IRS tax claims represent "actual, necessary expenses" of administration, the Amended Plan does not authorize the filing of such claims against the consolidated estate for an unlimited period of time. Section 503 of the Bankruptcy Code permits the filing of a request for payment of an administrative expense after notice and a hearing. Such expense may include taxes incurred by the bankruptcy estate. *Id.* *See also In re Lambdin*, 33 B.R. 11 (Bkrtcy. M.D. Tenn. 1983). However, in order to recover payment, a claim for administrative expense, like all other claims, must be filed in a timely fashion. *In re Holywell Corp.*, 68 B.R. 134, 137

(Bkrtcy. S.D. Fla. 1986); *In re Pan Lon International, Inc.*, 61 B.R. 549 (Bkrtcy. S.D.N.Y. 1986); *In re Lake Winnebago Development Co., Inc.*, 55 B.R. 1005 (W.D. Mo. 1985). *See also In re Seminole Backhoe Services, Inc.*, 33 B.R. 914, 917 (Bkrtcy. N.D. Tex. 1983).

The Bank and Liquidating Trustee argue that because the tax claims, for which no proofs of claim have ever been filed, are untimely, the Appellants are estopped from asserting them now. *See In re International Horizons, Inc.*, 751 F.2d 1213, 1217 (11th Cir. 1985) (IRS's failure to file timely amended proofs of claim for corporate income taxes barred recovery of same from debtors undergoing bankruptcy reorganization); *In re Hebert*, 61 B.R. 44, 47 (Bkrtcy. E.D. La. 1986) (IRS waived right to challenge its treatment under Chapter 13 reorganization plan where it failed to object or take any affirmative action prior to the plan's confirmation).

The Appellants nevertheless appear to contend either that their claims are not untimely or that no proofs of claim need be filed at all, based on the following two grounds. First, as to the taxes assertedly owed on the Washington properties, the Appellants rely on the Bankruptcy Court's Order on Emergency Motion to Treat Proceeds of the Sale as Cash Collateral, to Separate and Account for Cash Collateral, entered December 31, 1984, pursuant to which Debtor Holywell Corporation was required to continue to provide administrative support for certain companies involved with the Washington properties until, *inter alia*, "all obligations to the Internal Revenue are determined and paid." *In re Holywell Corp., et al.*, Case Nos. 84-01590-BKC-TCB, et al., Order at 2 (Bkrtcy. S.D. Fla. Dec. 31, 1984). The Appellants argue

that this requirement suffices to establish their entitlement to the taxes owed on the sale of the Washington Center properties. The Court rejects this argument. The generalized reference to tax obligations in the Bankruptcy Court's Cash Collateral Order does not amount to the requisite proof of claim contemplated by the Bankruptcy Code and the terms of the Amended Plan itself. *In re International Horizons, supra;* Amended Plan, Art. I.

Second, the Appellants claim that the Liquidating Trustee's duty to file the returns and pay the taxes owed on both the Washington and Miami Center properties arises automatically, as a matter of federal law. They base this contention on the statutory requirements that "a trustee in a case under title 11, or an assignee" and the fiduciary of an individual debtor's estate are responsible for the filing of returns and paying of taxes owed by corporate and individual debtors, respectively. 26 U.S.C. §§6012(b)(3), (4), 6151.[3] *See also In the Matter of I.J. Knight*

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[3] 26 U.S.C. §6012(b)(3), (4) provides as follows:

(3) In the case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by orde of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not each property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) . . . Returns of an estate . . . of an individual under chapter . . . 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

(Continued on following page)

Realty Corp., 501 F.2d 62 (3d Cir. 1974). However, the Bankruptcy Judge determined – and this Court finds no error in that determination – that the Liquidating Trustee fits neither of those definitions. Because of the limited and essentially ministerial functions assigned to the Liquidating Trustee by the Amended Plan, *see* Amended Plan, Art. V. at 43, the Liquidating Trustee is a contract trustee, rather than a "trustee in a case under title 11;" further, the Liquidating Trustee's non-discretionary duties to identify and pay allowed claims in accordance with the terms of the Amended Plan are more akin to those of a disbursing agent, rather than an assignee or fiduciary. *See In re Alan Wood Steel Co.*, 7 B.R. 697 (Bkrtcy. E.D. Pa. 1980).

In addition, the Bankruptcy Court ruled that the Liquidating Trust is a grantor trust and, for that reason, is not a separate taxable entity under the Internal Revenue Code. Pursuant to the Code's grantor trust provisions, *see* Subpart E of Subchapter J, 26 U.S.C. §§71-79, a grantor may be taxed individually as owner of the trust if the trust income is, "or, in the discretion of the grantor or a non-adverse party, or both, may be" applied to discharge a legal obligation of the grantor. 26 U.S.C. §677(a); Treas. Reg. §1.677(a) – 1(d). As a non-adverse party within the

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26 U.S.C. §6151 provides, in pertinent part, that

(a) . . . [w]hen a return of tax is referred under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed . . .

meaning of the Code, *see* 26 U.S.C. §672(a), (b),[4] the Liquidating Trustee is authorized to use the trust income to discharge the Debtors' legal obligations. As such, the Debtors may be taxed as grantors. In the case of *In re Sonner*, 53 B.R. 859 (Bkrtcy. E.D. Va. 1985), a reorganization plan requiring the Liquidating Trustee to hold and distribute proceeds from the sale of the Debtors' real property established a grantor trust, and on that basis the debtor, as grantor, was liable for payment of federal income taxes owed on the sale. As in the present case, the plan in *Sonner* contained no provision for the payment of taxes. Likewise, in *Stockton v. United States*, 335 F. Supp. 984 (C.D. Cal. 1971), a trust established for the purpose of liquidating all debts of the grantor was deemed a grantor trust, with the grantor-owner maintaining responsibility for paying federal income taxes.

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[4] 26 U.S.C. §672 defines adverse and non-adverse parties as follows:

(a) *Adverse party* – For purposes of this subpart, the term "adverse party" means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust. A person having a general power of appointment over the trust property shall be deemed to have a beneficial interest in the trust.

(b) *Non-adverse party* – For purposes of this subpart, the term "non-adverse party" means any person who is not an adverse party.

This Court finds no error in the Bankruptcy Judge's conclusion that the Liquidating Trustee is not an adverse party within the meaning of Section 672(a). *See United States v. Butterff*, 563 F.Supp. 450, 454 (N.D. Tex.), aff'd, 761 F.2d 1056, 1060-61 (5th Cir. 1985); Treas. Reg. §§1.672(a) – 1(a), (a) – 1(b).

Based on the above analysis, the Court finds no error in the Bankruptcy Court's ruling that the Liquidating Trustee is not responsible for filing of federal income tax returns or payment of income tax on the sale of the Washington and Miami Center properties.

The recent decision of the Supreme Court of the United States in *California State Board of Equalization v. Sierra Summit, Inc.*, ___ U.S. ___, 109 S.Ct. 2228 (1989), does not undermine this conclusion. In that case, the Supreme Court ruled that a state may impose a state sales tax on a liquidation sale held by a trustee in bankruptcy. Even assuming that this holding might be broadly applied to validate the federal government's imposition of federal income taxes, it remains inapplicable to the case at bar, since unlike the situation in *Sierra Summit*, the Liquidating Trustee here is not a "trustee in bankruptcy" subject to the provisions of 26 U.S.C. §6012.

V. Conclusion

In light of the foregoing, the Court affirms the Bankruptcy Court's conclusion that recognition of the Appellants' tax claims would amount to "an impermissible modification of the confirmed plan," as prohibited by 11 U.S.C. §1127(b). *Fred Stanton Smith, etc.*, Adv. No. 87-0627-BKC-SMW-A, Findings of Fact and Conclusions of Law at 11. *See also In re Northampton Corp.* 59 B.R. 963 (E.D. Pa. 1984). Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. The Final Judgment and Findings of Fact and Conclusions of Law entered by the Bankruptcy Court on April 28, 1988, are hereby AFFIRMED.

2. The Bank's motion to dismiss the appeal as moot is GRANTED in PART and DENIED in PART, as set forth in Section II *supra*.

3. The stay of the Bankruptcy Court's Final Judgment, entered by this Court on June 20, 1988, is VACATED. Accordingly, the request of Intervenor Shutts & Bowen for an Order to pay in full the costs and fees awarded to Shutts & Bowen by the Bankruptcy Court is now MOOT. Likewise, the motion of the Liquidating Trustee to lift the stay for the purpose of authorizing consummation of the *ad valorem* tax settlement with Dade County is now MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of July, 1989.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

Copies furnished to: Herbert Stettin, Esq., Vance E. Salter, Esq., Robert M. Musselman, Esq., Robert A. Mark, Esq., Theodore B. Gould, S. Harvey Ziegler, Esq., Thomas F. Noone, Esq., Frank Deleon, Esq.,

APPENDIX S

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Cases No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

IN RE: HOLYWELL CORPORATION, *et al.*,

Debtors.

Adv. Proc. No. 87-0523-BKC-SMW-A

FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust,

Plaintiff,

vs.

THE BANK OF NEW YORK
HOLYWELL CORPORATION,
MIAMI CENTER CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
CHOPIN ASSOCIATES and
THEODORE B. GOULD,

Defendants.

ORDER ON DEBTORS' "UNDERSECURITY" CLAIM

THIS ADVERSARY PROCEEDING was tried on December 8, 1987. Count III of the Complaint prays for a declaratory judgment on the Debtors' claim that The Bank of New York (the "Bank") was an undersecured

creditor and therefore not entitled to a credit for post-petition interest when the Bank purchased the Miami Center Project.

Having reviewed the pleadings, the prior findings establishing the value of the Bank's collateral and the amount of the Bank's lien, the confirmed plan, and applicable law, and having heard argument of counsel, it is hereby ORDERED AND ADJUDGED that:

1. The Bank was not an undersecured creditor in these reorganization proceedings.

2. As to Count III of the Liquidating Trustee's Complaint, judgment is therefore entered in favor of the Liquidating Trustee and the Bank, and against the claims of the Debtors.

SO ORDERED in Chambers at Miami, Florida, this 18 day of December 1987.

/s/ Sidney M. Weaver
United States Bankruptcy
Judge

cc: Counsel of Record per
attached Service List

APPENDIX T

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-151-Civ-ARONOVITZ

IN RE: HOLYWELL CORPORATION, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN CORPORATION, and THEODORE B. GOULD,

Debtors.

HOLYWELL CORPORATION, *et al.*,

Appellants,

vs.

FRED STANTON SMITH, and THE BANK OF NEW YORK,

Appellees.

FINAL ORDER VACATING DECLARATORY JUDGMENT ON COUNT III OF ADVERSARY COMPLAINT

I. *Introduction*

Appellants Holywell Corporation, et al. ("Holywell") bring this appeal challenging the bankruptcy court's December 18, 1987 Order finding that appellee, The Bank of New York ("BONY") "was not an undersecured creditor," and entering judgment in favor of trustee Fred Stanton Smith ("Smith") on Count III of his adversary complaint. In Count III, Smith sought and received a declaratory judgment that BONY was not undersecured, and that therefore it was "entitled to receive credit against purchase price at closing for post-petition interest." Pursuant to the Amended Consolidation Plan of Reorganization (the "Plan"), BONY obtained a $27,050,115.02 credit towards the purchase price of the Miami Center project which represented interest accrued post-petition.

II. *Procedural History*

Appellants are debtors who had been involved in the development of the Miami Center project, a modern thirty-five story hotel and office building structure located on the bay in downtown Miami. BONY financed the project's construction and was the principal creditor. Debtors filed voluntary petitions for bankruptcy after the mortgage fell into default. After the bankruptcy court confirmed the Plan of reorganization, it required debtors to post a $140 million bond to stay implementation of the Plan during an appeal to the District Court. Debtors appealed this bond requirement to the District Court, which reduced the amount of the bond to $50 million and

gave debtors an additional period of time in which to post bond.

Debtors appealed the $50 million bond setting to the Eleventh Circuit, which dismissed debtors' appeal for lack of jurisdiction. Debtors failed to post the $50 million bond, and beginning on October 11, 1985, the trustee and BONY began to implement the Plan. BONY's designee, a land trust, received title to the Miami Center project, its furniture, fixtures and equipment. In exchange, BONY released its judgment lien and $30 million of cash collateral, and payed about $13.6 million in additional consideration.

Debtors appealed to the District Court both the bankruptcy court's order confirming the Plan and an earlier order consolidating the debtors' estates. The Court concluded that the appeals before it were not moot, but upon BONY's application certified to the Eleventh Circuit the issue of whether debtors' appeal was moot. The Eleventh Circuit declined to accept this certification. The District Court remanded the appeal to the bankruptcy court for further findings of fact and conclusions of law.

The bankruptcy court entered detailed findings and affirmed its previous rulings in all respects. On appeal, the District Court did not revisit the mootness issue, instead ruling on the merits, affirming the bankruptcy court's orders of consolidation and confirmation. Debtors proceeded with an appeal to the Eleventh Circuit, which on June 29, 1987 dismissed the appeal as moot due to the effective consummation of the Plan of reorganization. 820

F.2d 376 (11th Cir. 1987). Debtors petitioned for rehearing, and on September 8, 1987 the Eleventh Circuit concluded on rehearing that it had erred in stating that the Miami Center project was sold to a good faith purchaser. 826 F.2d 1010 (11th Cir. 1987). Nonetheless, the court held that this error did not affect the court's prior holding, and denied the petition in all other respects.

On a further petition for rehearing and suggestion for rehearing en banc, the Eleventh Circuit, on March 10, 1988, rejected its two earlier opinions and concluded for the first time that the *District Court* should have dismissed the appeal to it as moot. 838 F.2d 1547 (11th Cir. 1988). "Arguably the district court should have dismissed the appeal as moot when the case was first before it. But we pretermit discussing this because we hold that the court should have dismissed the appeal as moot when the case came back to it after remand." *Id.* at 1553.

III. *The present dispute*

Trustee Smith initiated this adversary action in the bankruptcy court due to his concern over a statement in the bankruptcy court's original confirmation order dated August 8, 1985: "The Bank of New York, the major creditor, whose claim is undersecured. . . ." Smith's concern is understandable, as he does not dispute Holywell's contention that under Section 506(b) of the Code, a post-petition interest credit is *only* appropriate for an oversecured creditor. *See United Stav. Ass'n v. Timbers of Inwood Forest*, 108 S. Ct. 626, 631 (1988). It is also undisputed that BONY applied a $27,050,115.02 credit towards

the purchase of the Miami Center project representing post-petition interest.

While Holywell did not initiate this dispute, it strenuously takes issue with the bankruptcy court's two recent findings, first that BONY was not undersecured, and second that BONY was "entitled to receive" the $27 million credit. In addition to the original bankruptcy court order, Holywell has directed the Court's attention to other evidence on the security issue, in particular statements made by both BONY's counsel, Mr. Vance Salter, Esquire, and Smith's former counsel, Mr. Irving Wolff, Esquire.

At a hearing held before this Court on January 1, 1986, the Court inquired of Salter whether BONY had taken all relevant factors into account in drawing its conclusion that "the bank is undersecured?" Mr. Salter responded "Yes indeed." In fact, Salter was addressing the very same statement in the bankruptcy court's order which referred to BONY as an undersecured creditor.

Secondly, Wolff and appellees are defendants to an action pending in the United States District Court for the Western District of Virginia, *Twin Development Corporation v. Fred Stanton Smith, Bank of New York, and Irving Wolff*, 87-0037-C (W.D. Va.). In certain answers to Interrogatories propounded to Wolff in that case, he reveals that the trustee herein sought and obtained indemnification from BONY "because the Confirmation Order found the Bank to be an undersecured creditor, and in the closing adjustments the Bank took credit for post-filing interest in the amount of $27,050,115." This indicates that the trustee sought to protect his position due to concern over the

credit for post-petition interest provided for in the Plan of reorganization.

IV. *The Eleventh Circuit*

The bankruptcy court entered its declaratory judgment order after the Eleventh Circuit issued its second opinion dismissing as moot the debtors' challenge to the Plan. This second opinion modified the Eleventh Circuit's first opinion, but nonetheless dismissed the appeal as moot. The Eleventh Circuit had concluded that the debtors' failure to obtain a stay pending appeal rendered the appeal to the Eleventh Circuit moot because the court could not order relief without compromising the integrity of the sale of the property. 820 F.2d at 376. As the Plan of reorganization had already been substantially consummated, the court found that it could not grant "effective judicial relief." 820 F.2d at 380.

The Eleventh Circuit's final order, issued upon a suggestion for rehearing en banc, expanding and elaborated on the mootness issue. The court essentially affirmed the reasoning in its earlier decision that the sale of the Miami Center project rendered substantive challenges to the Plan moot. But for the first time the Eleventh Circuit held that this mootness principle meant that the District Court itself should have decided Holywell's appeal on mootness grounds, instead of reaching the merits.

The Eleventh Circuit held that mootness precluded the District Court from reaching the merits although the debtors did not seek to get the property back. 838 F.2d at 1555. The court rejected debtors' request to have the

Miami Center project revalued to a higher figure, and to have a realignment of certain priorities and claims, because "the consequences of what debtors seek strike at the sale to the bank and the reorganization plan as a whole." *Id.* at 1556.

V. *A premature ruling*

The bankruptcy court would have done well to wait until the Eleventh Circuit issued a mandate on the *Miami Center* decision. The final option by the Eleventh Circuit makes it crystal clear that it is no longer appropriate for the bankruptcy court to re-visit the substantive merits of the confirmed Plan. The overarching meaning of the Eleventh Circuit's opinion is that it will not countenance the "piecemeal dismantling" of the Plan. 838 F.2d at 1555. Consequently, the question of whether BONY was "entitled" to obtain the $27 million credit is no longer subject to adjudication.

Whether or not BONY was "entitled" to obtain the credit for post-petition interest, the credit is now lawful in the sense that it is an integral component of the confirmed Plan. The Eleventh Circuit has decided that "[t]he bankruptcy court did err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified. . . ." 838 F.2d at 1557. The Plan unmistakably provided for BONY to have a credit for interest and expenses accruing through the date of closing, and the closing statement itself specifically provided for "[i]nterest to October 9, 1985."

Although the credit itself is not subject to collateral attack at this date, the validity of the credit under Section 506(b) as a matter of law must remain unanswered. BONY has filed a motion to dismiss this appeal as moot, which relies upon the reasoning in the Eleventh Circuit's third opinion. But granting this motion would leave the bankruptcy court's declaratory judgment untouched, something which is inappropriate given the mootness doctrine.

Thereupon, BONY'S motion to dismiss this appeal as moot be, and the same is, hereby DENIED. The bankruptcy court's December 18, 1987 Order entering judgment on Count III of Smith's adversary complaint be, and the same is, hereby VACATED. Given this disposition, this case is REMANDED to the bankruptcy court with directions to dismiss Count III of the trustee's adversary complaint.

DONE AND ORDERED in Chambers at Miami, Florida this 21 day of July, 1988.

/s/ Sidney M. Aronovitz
United States District Judge

copies provided:

APPENDIX U

RELEVANT CONSTITUTIONAL and STATUTORY PROVISIONS

1. Article III of the Constitution provides as follows:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.
>
> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

2. The SEVENTH AMENDMENT of the Constitution provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

3. 28 U.S.C. §1480, *Jury trials*, provides as follows:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.
>
> (b) The bankruptcy court may order the issues arising under section 303 of title 11 to be tried without a jury.

4. 28 U.S.C. §1481, *Powers of Bankruptcy court*, provides as follows:

> A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.

5. 28 U.S.C. §1478, *Removal to the bankruptcy court*, provides as follows:

> (a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such

governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

6. 28 U.S.C. §959, *Trustees and receivers suable; management; State laws,* provides as follows:

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

(b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

7. 28 U.S.C. §960, *Tax liability*, provides as follows:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and Local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

8. 26 U.S.C. §6012(b) provides, in relevant part, as follows:

> (3) RECEIVERS, TRUSTEES AND ASSIGNEES FOR CORPORATION. In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property is being operated, such receiver, trustee or assignee, shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns."
>
> (4) RETURNS OF ESTATES AND TRUSTS. Returns of an estate, a trust, or an estate of an individual under Chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof."

9. 26 U.S.C. §7701(a)(6) defines a "fiduciary" as follows:

> " . . . a guardian, trustee, administrator, receiver, conservator, or any other person acting in a fiduciary capacity for any person."

10. 26 U.S.C. §11(a) provides as follows:

"A tax is hereby imposed for each taxable year on the taxable income of every corporation."

11. 26 U.S.C. §6151(a) provides as follows:

"Except as otherwise provided in this subchapter [A], when a return of tax is required under this title or regulations, the person required to make such return shall . . . pay such tax to the Internal Revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return."

12. 28 U.S.C. §157, *Procedures*, provides as follows:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation

of contingent or unliquidated personal injury tort or wrongful death claims against the estates for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estates;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the

equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear

and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

13. 28 U.S.C. §1409, *Venue of proceedings arising under title 11 or arising in or related to cases under title 11*, provides as follows:

(a) Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than $1,000 or a consumer debt of less than $5,000 only in the district court for the district in which the defendant resides.

(c) Except as provided in subsection (b) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544(b) of title 11 in the district court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced.

(d) A trustee may commenced a proceeding arising under title 11 or arising in or related to a case under title 11 based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the district court for the district where a State or Federal court sits in which, under applicable

nonbankruptcy venue provisions, an action on such claim may have been brought.

(e) A proceeding arising under title 11 or arising in or related to a case under title 11, based on a claim arising after the commencement of such case from the operation of the business of the debtor, may be commenced against the representative of the estate in such case in the district court for the district where the State or Federal court sits in which the party commending such proceeding may, under applicable nonbankruptcy venue provisions, have brought an action on such claim, or in the district court in which such case is pending.

14. 28 U.S.C. §1334, *Bankruptcy cases and proceedings*, provides as follows:

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising

in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. . . ."

15. 11 U.S.C. §1141, *Effect of confirmation*, provides as follows:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder,or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after a confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502 (g), 502 (h), or 502 (i) of this title, whether or not –

(i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if –

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

16. 11 U.S.C. §1142, *Implementation of plan*, provides as follows:

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan. . . . such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

17. 11 U.S.C. §1129, *Confirmation of plan*, provides, in relevant part, as follows:

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

18. 11 U.S.C. §1127, *Modification of plan*, provides as follows:

(a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if [the court, after notice and a hearing, confirms such plan, as modified, under section 1129 of this title, and circumstances warrant such modification] circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

. . . .

19. 11 U.S.C. §1104, *Appointment of trustee or examiner*, provides as follows:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee –

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders or securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

(b) If the court does not order the appointment of a trustee under this section, then at any time before the commencement of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if –

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

(c) If the court orders the appointment of a trustee or examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the court shall appoint one disinterested person to serve as trustee or examiner, as the case may be, in the case.

20. 11 U.S.C. §1106, *Duties or trustee and examiner.*

(a) A trustee shall –

(1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title;

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable –

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7 or 13 of this title or dismissal of the case;

(6) for any year for which the debtor has not filed a tx return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information; and

(7) after confirmation of a plan, file such reports as are necessary or as the court orders.

(b) An examiner appointed under section 1104 (c) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

21. 11 U.S.C. §1107, *Rights, powers, and duties of debtor in possession,* provides as follows:

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106 (a) (2), (3), and

(4) of this title, of a trustee serving in a case under this chapter.

22. 11 U.S.C. §506, *Determination of secured status,* provides as follows:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless –

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

23. 11 U.S.C. §505, *Determination of tax liability*, provides as follows:

(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any find or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(b) A trustee may request a determination of any unpaid liability of the estate for any tax incurred during the administration of the case by submitting a tax return for such tax and a request for such a determination to the governmental unit charged with responsibility for collection or determination of such tax. Unless such retrun is fraudulent, or contains a material misrepresentation, the trustee, the debtor, and any successor to the debtor are discharged from any liability for such tax –

(1) upon payment of the tax shown on such return, if –

(A) such governmental unit does not notify the trustee, within 60 days after such request, that such return has been selected for examination; or

(B) such governmental unit does not complete such an examination and notify the trustee of any tax due, within 180 days

after such request or within such additional time as the court, for cause, permits;

(2) upon payment of the tax determined by the court, after notice and a hearing, after completion by such governmental unit of such examination; or

(3) upon payment of the tax determined by such governmental unit to by due.

(c) Notwithstanding section 362 of this title, after determination by the court of a tax under this section, the governmental unit charged with responsibility for collection of such tax may assess such tax against the estate, the debtor, or a successor to the debtor, as the case may be, subject to any otherwise applicable law.

24. 11 U.S.C. §362, *Automatic stay*, provides, in relevant part, as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investors Protection Act of 1970 (15 U.S.C. 78eee(a) (3)), operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(c) Except as provided in subsection (3), (e), and (f) of this section –

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied.

25. 11 U.S.C. §1123, *Contents of plan*, provided, in relevant part, as follows:

(b) Subject to subsection (a) of this section, a plan may . . .

(5) include any other appropriate provision not inconsistent with applicable provisions of this title.

26. 11 U.S.C. §105, *Power of court*, provides as follows:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.
